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[1941] II M. L. J.
July—December

PUBLISHED BY
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PRINTED AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE.
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THE
MADRAS LAW JOURNAL.

II] JULY [1941

INCREASE IN THE STRENGTH OF THE HIGH COURT.

The appointment of two additional Judges to the High Court for a period of two years from the re-opening of the Court after the summer recess renders it desirable to take account of the growth in the strength of the Bench from time to time and the causes responsible therefor. Prior to the establishment of the High Court, there were functioning at Madras, the Sadar Diwani Adawlat and the Supreme Court. The former consisted originally of the Governor and the Members of his Council.[1] It was the chief court of appeal in civil matters from the decisions of the courts in the mofussil. It had also a certain amount of original jurisdiction by virtue of the power given to it to take over to its file, suits exceeding Rs. 45,000, from the zillah Courts, and when the latter were replaced by provincial courts, the original jurisdiction was extended to suits over Rs. 10,000. Regulation 4 of 1806 vested the functions of the Sadar Diwani Adawlat in two regular Judges, not being members of the Executive, with the Governor as President. The latter was however to exercise only an occasional power of superintendence over the other Judges. In 1807, the Sadar Diwani Adawlat was reconstituted with a member of the Governor's Council as Chief Judge and three Puisne Judges to be chosen from among the Company's servants. By Regulation 3 of 1825, the Governor-in-Council was given power to appoint additional Judges whenever needed. The arrangement continued in force till the Court was absorbed in the High Court in 1862.

A statute of 1800, 39 and 40 Geo. III, c. 79 provided for the constitution of a Supreme Court in Madras, similar to the one created at Calcutta and the Charter constituting the Court was issued in 1801. S. 2 of the statute declared that it shall be lawful for "His Majesty, his heirs and successors, by Charter or Letters Patent under the Great Seal of Great Britain, to erect

1. *See* S. 2 of Madras Regulation 5 of 1802.

and establish a Supreme Court of Judicature at Madras....... to consist of such and the like number of persons to be named from time to time by His Majesty, his heirs and successors.'' Clause (6) of the Letters Patent of the Supreme Court however prescribed that the number of Judges should be only 3 including the Chief Justice, the qualifications of the Judges being that they should be Barristers in England or Ireland of not less than five years' standing. It stated: '' And we do further will, ordain and appoint, that the said Supreme Court .... shall consist of and be holden by and before one principal Judge who shall be and be called the Chief Justice .... and two other Judges who shall be and be called Puisne Judges ...... which Chief Justice and Puisne Judges shall be Barristers in England or Ireland of not less than five years' standing, to be named and appointed from time to time by us, our heirs and successors, by Letters Patent under our and their Great Seal of Great Britain whilst such seal shall be used, and afterwards under our and their Great Seal of the United Kingdom of Great Britain and Ireland and such Chief Justice and Puisne Judges and all and every of them shall hold their said offices severally and respectively during the pleasure of us, our heirs and successors, and not otherwise''. The statute 24 and 25, Vic. c. 104 provided for the creation by Letters Patent of a High Court of Judicature at Madras among other places, into which were to be merged the Supreme Court and the Sadar Diwani Adawlat. S. 2 of the Act dealt with the constitution of the High Court and prescribed that it shall consist of a Chief Justice and as many Judges not exceeding 15 as Her Majesty from time to time think fit and appoint. All the Judges including the Chief Justice were to be recruited from (1) Barristers of not less than five years' standing, or (2) Members of the Covenanted Civil Service of not less than ten years' standing and who shall have served as zilla Judges or shall have exercised the like powers for at least three years of such period, or (3) Persons who have held judicial office not inferior to that of Provincial Sudder Ameen or Judge of a Small Cause Court for a period of not less than five years, or (4) Persons who have been pleaders of a Sudder Court or High Court for a period of not less than ten years, etc. It was laid down by a proviso that not less than one-third of the strength of the High Court including the Chief Justice should be Barristers and not less than one-third should be members of the Covenanted Civil Service. The Judges of the Supreme Court and the permanent Judges of the Sadar Diwani Adawlat at the time of the constitution of the High Court were to be *ipso facto* Judges of the High Court. Thus at the time of the creation of the High Court, two Judges who were functioning in the Supreme Court and four who were in the Sadar Court automatically became Judges of the new High Court. In that way the High Court started with six Judges. The Letters Patent constituting the

Court was issued on 26—6—1862. Clause (2) thereof declared: "We do hereby appoint and ordain, that the said High Court of Judicature at Madras shall, until further or other provision shall be made by us or our heirs and successors in that behalf, in accordance with the recited Act, consist of a Chief Justice and five Judges". S. 17 of the Act had also provided that "it shall be lawful for Her Majesty, if Her Majesty shall so think fit at any time within three years after the establishment of any High Court under this Act by her Letters Patent to revoke all or such parts or provisions as Her Majesty may think fit of the Letters Patent by which such Court was established, and to grant and to make such other powers and provisions as Her Majesty may think fit". S. 1 of 28 Vic. c. 15 extended the time for such revocation of the Letters Patent till 1—1—1866 and in fact, within that time, on 28—12—1865, the Letters Patent of 1862 was superseded and a fresh Letters Patent issued. The latter did not contain any provision fixing the strength of the High Court with the result that the limit prescribed by the earlier Letters Patent stood removed and the matter was left to be governed by the provisions of the statute 24 and 25 Vic. c. 104, namely, that the High Court shall consist of a Chief Justice and as many Judges not exceeding 15 as the Crown may from time to time think fit and appoint. The hands of the Crown being thus unfettered in the matter, it had ample powers to appoint any number of Judges not exceeding 15 including the Chief Justice. As a matter of fact, though to start with, the High Court had six Judges, a Chief Justice and five Puisne Judges, the number fell to five sometime later. But in 1888 a fifth Puisne Judge was appointed to "assist in working off the heavy and increasing arrears in the Court". A sixth was added in 1907 and a seventh in 1909. In 1912 the strength of the Court was increased by the addition of two temporary Judges and from July, 1914, there were four temporary Judges. Subsequently the permanent strength of the Court was raised first to 12, and then to 14. S. 101 (2), proviso (*ii*) of the Government of India Act, 1915, fixed the maximum number of Judges for all High Courts at 20, but S. 220 of the Government of India Act, 1935, has varied the provision and enacted that every High Court shall consist of a Chief Justice and such other Judges as His Majesty may from time to time deem it necessary to appoint, provided that the Judges so appointed together with the additional Judges that may be appointed by the Governor-General under S. 222 (3) shall at no time exceed in number such maximum number as His Majesty in Council may fix in relation to that Court. By the Government of India (High Court Judges) Order, 1937, the sanctioned strength of the Madras High Court excluding the Chief Justice but including the additional Judges that could be appointed under S. 222 (3) is 15. Thus under the constitution established by the Act of 1935, the Madras High Court can

have 16 Judges inclusive of the Chief Justice and that limit has now been reached with the appointment of the additional Judges recently made. As regards eligibility for Judgeship and the necessity for a certain proportion of the Judges being Barristers or members of the Covenanted Civil Service, the provisions contained in 24 and 25 Vic. c. 104 were retained *mutatis mutandis* till 1935. The Government of India Act of that year has, while leaving substantially unaffected the qualifications prescribed, swept away the former provisions reserving a certain percentage to Barristers and Members of the Indian Civil Service. It has also removed the rule that the Chief Justice should be a Barrister. The above survey indicates how in course of time the strength of the High Court has gradually risen from 6 to 16. Another notable feature is that additions to the Bench sanctioned as a temporary measure in the first instance have in the past generally tended to become permanent.

Addition to the strength of the High Court had always two objects to achieve, namely, to clear off the accumulated arrears and to cope with fresh institution. *Apropos* the conditions in England, Lord Loreburn, L.C. once observed: "I am most anxious to see the Courts of this country made efficient business instruments, so that we may be able to say to suitors, 'If you come to-morrow we will hear you the day after'". The ideal is one which is certainly desirable for our province as well, but the real and the ideal remain far apart and the steady accumulation of arrears has been felt to be a tantalising problem to solve. Causes contributing to the increase in arrears and remedial measures that might be adopted have been pointed out in the columns of this journal on many occasions. Rise in population, multiplication of laws and regulations, growth of commerce, industrialisation of the country, are some of the causes likely to augment the volume of litigation. But what with the constitution in an increasing measure of special tribunals with summary procedure such as the Panchayat Courts, Debt Conciliation Boards, etc., levy of enhanced rates of court-fee, adoption of rules for disposal of second appeals by single Judges and similar expedients, general economic depression during the last decade, these and other factors have on the other hand produced an impression that the volume of litigation is steadily coming down and that there can be no warrant for the addition to the strength of the High Court at present. A comparison of the statistics for the two years 1914 and 1939[1]—each year witnessing the commencement of a great world war—is fairly instructive.

1. Figures regarding Criminal work, Income-Tax References, Insolvency Petitions, Miscellaneous Petitions, etc., have been left out. The statistics for 1914 have been taken from pp. 9-10 (Journal) 30 M.L.J. and those for 1939, from p. 4, Statistics of Civil Courts in the Madras Presidency for 1939.

Description.	Institution.		Disposal.		Arrears at the end of the year.	
	1914	1939	1914	1939	1914	1939
Suits ..	465	307	551	355	381	479
Appeals from original decrees of mofussil courts.	433	343	513	495	937	1137
O. S. Appeals ..	118	67	75	78	157	78
C. C. C. Appeals ..	29	79	14	138	46	98
Second Appeals ..	2628	1107	2488	1451	4631	2624
L. P. Appeals ..	410	76	345	155	333	61
C. M. A's. ..	418	562	389	603	592	727
C. M. S. A's. ..	148	249	122	234	172	389
C. R. P's. ..	1121	2665	1062	2100	1510	3071

Excepting for C.M.A's., C.M.S.A's. and C.R.P's., the institution in 1914 has been relatively higher than in 1939; likewise the disposals generally. Though as an aftermath of the war of 1914 there was an increased output of litigation in the first instance this has been more than been counterbalanced by the subsequent fall consequent upon the economic conditions of the last decade. As regards arrears, their growth has to some extent been arrested and the figures at the end of 1939 do not show much variance from those at the end of 1914. As an explanation for the absence of more substantial reduction in the arrears in spite of the increased personnel of the Bench it has sometimes been suggested that the Judges of an earlier day showed deeper consideration and rendered more efficient work generally; it has also been pointed out at the other end, that the Judges have now more work to do by having to wade through too much law made by legislatures as well as by different superior Courts in the land, whereas the Judges formerly were guided mostly by fundamental principles merely. Be that as it may, one would wish that before making these periodical additions to the Bench the utility of such measures as the adoption of a larger number of working days and slightly longer working hours, delegation of purely routine matters to the Registrar and the Master on a larger scale, etc., should be tried. It is to be hoped that the appointment of the two additional Judges recently sanctioned will result in the accumulated arrears being cleared off within the next two years, particularly as fresh

institution is tending to go down, and that there will not arise any necessity for the strength to be permanently raised.

[CONTRIBUTED.]

BOOK REVIEWS.

PENOLOGY IN INDIA: Published by the Indian Publications, Ltd., Lalgir Chambers, Tamarind Lane, Fort, Bombay, 1940, 208 pages. Price Rs. 3.

This publication is a record of official proceedings, including the addresses delivered and papers read, of the First Indian Penal Reform Conference held in the Convocation Hall, Bombay, on 24th and 25th February, 1940, which led to the formation of the Indian Penal Reform League.

Penology is a subject intimately linked up with social welfare and its modern trends form a particularly fascinating subject of study. It is now largely recognised that crime is an anti-social act engendered and fostered by economic factors operating often on a person's latent vicious propensities which in the first instance are not always ineradicable by proper treatment. The causative factors in crime are many. Heredity, pathological conditions, poverty and passion do all in different degrees contribute to crime. There is a preventive, a punitive, as well as a curative aspect in the treatment of crime. Protection of society and rehabilitation of the prisoner should be the twin objectives of all penal reform. The normal misdemeanant and the hardened recidivist will have to be differently treated; likewise a proper discrimination has to be made between under-trials and convicts, and between juvenile delinquents and adult criminals. The present publication gives us a lot of useful information on various points interesting not only to those engaged in the study of penology but also to the lay public. The subjects covered include Criminal law and procedure, Modern penal movement, Prison practice, Juvenile problem, Psychology and crime, and Probation and criminal tribes. We have great pleasure in welcoming the publication which deserves to be widely read.

1941 REPORT OF THE COMMITTEE OF THE BOMBAY LEGAL AID SOCIETY for the year ending 31st December, 1940.

The Bombay Legal Aid Society whose objects are *inter alia* to give legal advice and legal assistance in negotiation and litigation to poor persons and to undertake cases, civil and criminal, so as to make justice accessible even to the meanest individual makes interesting reading and presents an imposing record of useful work done during the year 1940. As many as 98 appli-

cations for legal assistance were dealt with by the Society, besides giving advice in a number of cases embracing a wide area of justiciable matter. It is to be hoped that the splendid example set by the Bombay Society in this form of unselfish and useful work will inspire the starting of similar societies and institutions elsewhere all over India.

THE ARBITRATION ACT, 1940, by S. C. Das, M.A., LL.B., Advocate, Allahabad High Court and Editor, Allahabad Law Times. Published by the Allahabad Law Journal Press, 1941, 345 pages. Price Rs. 6.

The book is by one whose name is familiar to the legal world as the author of a number of useful publications. In the present work the text of the Indian Arbitration Act, 1940, with adequate commentaries has been provided. The case law, English and Indian, down to the end of 1940 has been noticed under appropriate headings in a helpful manner. A feature of the book adding to its utility is the incorporation of the texts of the relevant English Acts such as the Arbitration Acts of 1889, 1934, etc., as well as the provisions bearing on arbitration contained in Indian enactments like Act VIII of 1859, Act XV of 1882, etc., as an appendix. The introduction, giving a historical survey of the statutory provisions and the growth of the law of arbitration in India since the advent of the East India Company is another noteworthy feature. Too much brevity sometimes characterises the notes given under the sections making understanding somewhat difficult. On p. 50 it is stated that the authority of pleaders to refer in pending suits will be discussed in notes to S. 21. But there does not seem to be any direct reference to this point in the notes provided under that section.

The book is on the whole a useful addition to the literature on the topic of arbitration and is sure to be of great value to the members of the legal profession.

THE LAW OF EVIDENCE IN CRIMINAL CASES, by Sarat Chandra Chatterji, Advocate, High Court, Calcutta, 3rd Edition, by K.M. Ghosh, 1941. Published by Eastern Law House, Ltd., 15, College Square, Calcutta, 579 pages. Price Rs. 5.

The book is a commentary on the Indian Evidence Act intended specially to serve the requirements of the practitioners in the Criminal Courts. The amendments to the Act down to 1941 have been incorporated and in addition to the texts of the Indian Oaths Act, 1873 and the Bankers Books Evidence Act, 1891, the text of the Commercial Documents Evidence Act, 1939, has also been printed. The differences, wherever they exist, between English and Indian law have come in for appropriate notice.

The notes to the sections are reliable and exhaustive and are arranged under helpful headings. The citation of cases, English and Indian, is fairly full, though important decisions like *Ramanujam* v. *Emperor,* I.L.R. 58 Mad. 642 : 68 M.L.J. (Supp.) 73 (F.B.); *Attygalle* v. *Emperor,* 71 M.L.J. 321 (P.C.) and *Stephen Seneviratne* v. *The King,* A.I.R. 1936 P.C. 289 have not found inclusion.

The book is sure to be of great use to practitioners and we heartily welcome the publication.

EXCESS PROFITS TAX, by V. S. Sundaram. Published by Butterworth and Co., Ltd., 1941.

This book is intended to serve as a supplement to the Fifth Edition of the Law of Income-Tax in India by the same author and it is really in the light of this declared object that the incorporation into this work of about 100 pages of matter as Income-Tax Supplement has to be understood. The book gives the text of the Excess Profits Tax Act, XV of 1940, the rules framed thereunder, as well as commentaries on the sections. Though the tax imposed by the Act can be in its nature only temporary, still there are bound to arise in actual working a number of complicated problems, having regard to the highly technical character of the enactment. The elucidation of the sections so as to make them intelligible to the average man is no easy task. The author has sought to achieve this by a reference to the relevant decisions, Indian and English, given in cases relating to income-tax. Though the Excess Profits Tax is a development out of income-tax, still its ambit is not the same as that of the latter. Thus receipt in British India, *per se* will not attract the Excess Profits Tax as it attracts income-tax or super-tax. The notes to the sections are adequate and illuminating. The text of the Excess Profits Duty Act, 1919, and extracts from the United Kingdom Finance Acts, of 1915, 1916, 1917, 1918, 1919, 1926; 1937, 1938, 1939 and 1940, etc., are given as an appendix forming a noteworthy feature of the book.

The book is bound to be highly helpful to businessmen and lawyers alike and we have great pleasure in welcoming the publication.

THE DEBT CONCILIATION ACT: NEED FOR AMENDMENT.

The Madras Debt Conciliation Act has now been in force for nearly half a decade. Its working has brought to light a number of defects concerning both its policy as well as its provisions. Some of these are noticed in an article published elsewhere.[1]

As the nomenclature of the Act itself indicates conciliation and not coercion is to rule in relieving agriculturists from indebtedness. It is an "amicable settlement" that is to be promoted. Penalising the creditor is not within the scheme of the Act. To secure however the usefulness of the Debt Conciliation Board as an effective tribunal, there are certain special provisions. Of these S. 10 (2), which is the most dangerous from the creditor's standpoint authorises the Board to declare a debt due to a creditor "for all purposes and for all occasions to have been duly discharged", where without any justifying reason the creditor fails after being called upon to do so, to submit a statement of debts owed to him by the debtor in the manner prescribed by S. 10 (1). S. 11 imposes an obligation on the creditor submitting a statement under S. 10 (1) to furnish along with it full particulars relating to the debts and to produce at the same time all documents, accounts, etc., supporting his claim. Sub-S. (3) of S. 11 provides that if any documents or accounts in the possession or control of the creditor are not produced by him without valid reasons those documents shall not be admissible in evidence against the debtor in any suit by the creditor or by any one claiming under him for the recovery of the debt. Thus the only penalty attaching to wilful failure to produce the documents or accounts can be that prescribed in S. 11 (3) and there is hardly any warrant to apply S. 10 (2) in such cases and declare the debt due to the creditor to be discharged. It will be the duty of the Board in such cases to consider whether the debt in question is owing to the creditor and what is its precise amount, by having regard to the statement filed by the creditor, the admissions if any made by the debtor in his application or on oral examination and other similar evidence. The Board being however a tribunal which excepting for the chairman usually consists of members having no judicial experience, and the chairman himself being sometimes an essentially revenue officer like the Deputy Collector, there has often been a misapplication of S. 10 (2). To declare a debt due to a creditor as discharged, simply because he has not filed a statement confirming the particulars in the debtor's application, even where the debt due to him has been admitted, is a grossly arbitrary provision for which there is hardly any justification; to pass such an order against a creditor

1. *See* page 12.

after he has filed his statement within the appointed time, on the ground that he has not filed his accounts[1], or that he has challenged the jurisdiction of the Board in his statement[2], particularly where the debtor has not challenged either the debt or the amount due thereunder is altogether indefensible. It is very pertinent that in a recent case the High Court has been led to remark[3]:

"If administered in accordance with its spirit, the Debt Conciliation Act should, in spite of its defects, prove beneficial, but my experience gathered from the hearing of petitions for the quashing of orders of Debt Conciliation Boards, convinces me that the Act has not been administered by some Boards in the way it ought to be administered. I have noticed a tendency to use the powers conferred by S. 10 (2) of the Act arbitrarily and at times there has been flagrant misuse of the section. . . . . .

"Recalcitrant creditors are not deserving of sympathy, but it is difficult to see why a Debt Conciliation Board should be given the power to cancel a debt which the debtor himself admits to be due simply because a creditor has not filed a statement furnishing the particulars. . . . . .

"The cause for the maladministration of the Act in some cases may be that the members of the tribunals concerned have not the time to devote to the proper investigation of claims. The arbitrary nature of some of the orders, which I have seen, would suggest this. But if the legislative authority enacts a statute of this nature, it should make certain that there is proper machinery for working it. If there is no proper machinery, grave injustice is bound to follow."

These observations are weighty and cannot be ignored. It is therefore up to the Government to enact suitable amendments to the Act so as to ensure a proper machinery to work out its provisions and to abolish *inter alia* the penalty prescribed in S. 10.

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1. *Ramalingam Chettiar* v. *D.C.B., Dharmapuri*, (1941) 1 M.L.J. 108; *Venkataswami* v. *Maduliti*, (1941) 2 M.L.J. 155.
2. C. M. P. No. 4628 of 1940, 53 L.W. S. R. C. 5.
3. *See* judgment in C. M. P. No. 297 of 1941.

THE MADRAS DEBT CONCILIATION ACT (XI OF 1936): A SHORT STUDY.

BY

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It is a matter for regret that the Madras Debt Conciliation Act which so vitally affects a very large class of the litigant public has not attracted so far the attention that it deserves. This may, perhaps, be due to the fact that the Act, though passed in 1936, was originally applied only to a few select districts in the Province, and has been, only later, applied to larger areas.

The outstanding feature of the Act is the setting up of a new type of bureaucratic machinery under the style of Debt Conciliation Boards whose declared function is to "attempt to effect an amicable settlement" between the "agriculturist" debtor and his creditors. These Boards are to be under the immediate control of the Collector in the districts, and, under the overriding control of the Board of Revenue. The Boards are invested with a few judicial powers, but, in the field in which they are primarily intended to operate, they have not been given the power to settle the disputes by any binding decisions of their own. They are there, only to exert a moral pressure on the disputants, to coax them into sweet reasonableness if they can, and, thus, to induce the parties to come to an "amicable settlement" between themselves. Their functions are, thus, of an advisory nature; no sanction attaches to their decisions, in the sense that they can finally settle the disputes between the parties, by an overriding authority of their own. If the parties do not come to any agreement within one year of the initiation of proceedings (S. 17), or, if, at any earlier stage, the Boards consider that there is no use in attempting a settlement (S. 9), as, for instance, where the parties are intractable, the proceedings automatically terminate, leaving the parties in *status quo ante.* The parties are, on such termination, free to pursue the usual remedies available at law. But, so long as the proceedings are pending, there is a virtual suspension of the powers of the Civil Courts, in respect of matters pending before the Boards (Ss. 19 and 25).

The judicial powers of these Boards are categorised in a fasciculus of sections starting from S. 7 of the Act and culminating with S. 18. Special mention may be made of the following powers of the Board:—(*a*) the power to excuse delay on the part of a creditor in submitting a statement of his claim before the Board (S. 19); (*b*) the power to decide, where necessary, the "amount or the existence" of a debt [S. 11 (2)]; (*c*) the power to frame a schedule of assets and liabilities [S. 12 (3)]; (*d*) the power to decide, if an agreement come to between the debtor and the creditors is

"fair and equitable", and, if so, to direct the registration of such an agreement and, finally (S. 14); (*e*) the power to "certify" in proper cases that a creditor has "refused" a "fair" offer made by the debtor, and in consequence must suffer the disabilities mentioned in the Act (S. 18).

The rules framed under the Act provide mainly for a number of routine matters, such as the maintenance of Registers, and performance of a number of administrative duties.

The position of the Board in relation to the "Civil Court", an expression not defined in the Act, and to the Insolvency administration may be examined. The position as regards the Civil Courts is dealt with in Ss. 10 (3), 19 and 25. The broad effect of the two latter sections is to oust, almost completely, the jurisdiction of the Civil Court. The phrase "almost completely" is used, advisedly, because, it appears fairly clear that, although under the combined operation of these two sections, no new suits can be "entertained" (S. 19), nor old suits be "proceeded with" (S. 25), yet, so far as execution is concerned, the creditor can pursue his remedies at law, provided two negative conditions are satisfied, *viz.*, (*i*) he does not come within S. 18 (3) of the Act, and (*ii*) no execution proceeding is pending at the time when the Board's interference is invoked under S. 4 of the Act. To this narrow extent, then, is the jurisdiction of the Civil Court conserved; otherwise, its jurisdiction is entirely taken away in respect of "any matter pending before the Board".

Does the same position hold good in respect of the Insolvency Court, as well? It is submitted that the answer should be in the negative. The term "Civil Court" employed in S. 25 of the Act would not cover an Insolvency Court. It is well known that the Insolvency Court is a special statutory tribunal and cannot be considered as an ordinary Civil Court, in the ordinary significance of that term. Thus, it is said that, except under S. 4 of the Act V of 1920, the Insolvency Court may not decide questions of title. Conversely, the ordinary Civil Court may not decide questions falling within S. 53 or 54 of the same Act. It would follow, therefore, that there can be no question of the Insolvency Courts being affected, in any sense, by the pendency of proceedings before the Board. If this conclusion is right, there can be no difficulty in visualising the results of two different tribunals functioning in the same field, with varying powers and purposes. It is enough to say that confusion would result, with undesirable consequence to every one concerned.

These difficulties will not disappear, even if the conclusions were wrong and it were to be held that S. 25 hits at Insolvency Courts, as well. On that hypothesis, the matter would have to be considered in two different ways. First, the case may be taken, of

a debtor having been already adjudged insolvent[1]. In such a case, the debtor can have obviously nothing to gain by applying to the Board, except perhaps a certain amount of immunity from legal proceedings by his creditors. The property having vested in the receiver in insolvency, under S. 28 of the Act, no purpose whatever can be served by his entering into any agreement with the creditors. No property can be earmarked for the creditors, under S. 14, nor, can there be any use apart from the question of the legality, in the Board sanctioning such an agreement, under S. 18. Though the insolvency proceedings may have to be stayed—itself, a doubtful question, because, it is conceived, a receiver functioning under a Central enactment, cannot be made *functus officio,* by the operation of a Provincial one—still, there would be nothing left for any useful work to be done by the Board. The next case is where no insolvency proceedings have been initiated. In such cases, it is conceived that the Act will fully apply, and the field will be quite clear for the Board exercising its powers.

Apart, however, from this aspect, what is the purpose gained by creating a new machinery with powers somewhat analogous, but, not completely so, to those of the Insolvency agencies? The Act in question takes in, indeed, a few patches from the Insolvency law; thus, the power to frame a schedule of assets and liabilities is modelled on the power of the receiver in Insolvency to frame a schedule of creditors; and the power to substitute a more diligent creditor [S. 9 (*c*)] is modelled on S. 16 of Act V of 1920. Nothing, however, is gained by this sort of patchwork. If there were to be a complete adaptation of the Insolvency law—obviously, that has not been done, nor, would it be desirable—that will be inconsistent with the declared policy of the Act which is to "effect an amicable settlement", and *not* to effect an equitable distribution of the assets of the debtor amongst his creditor. Either way, therefore, this Act is not needed.

Is any advantage of a permanent character derivable at all from the Act? Has the declared object of the Act been in any way advanced? Can the Boards render any effective service? All these questions can result only in a negative answer.

The debtor may get some respite from his creditors, but, when the proceedings before the Board come to a close, infructuously, as they must, in a preponderatingly large majority of cases, the debtor will have to repay to the creditor all the latter's dues, of which, he had been kept out, by force of the law. It is true, indeed, that, during the pendency of the proceedings under the Act, the

1. If a debtor has been adjudicated insolvent, neither the debtor nor the creditor can apply under the D. C. Act for any relief, as insolvency takes away the jurisdiction of the Board, see *Venkayya* v. *Sambayya,* (1938) 2 M.L.J. 93 and *Dasaradharama Reddy* v. *Rahimtulla Hussani,* (1940) 1 M.L.J. 270. *Ed.*

debtor would be entitled to continue in possession of his properties and to enjoy the income. But, the gain under this head is illusory. The creditor's claim remains unaffected, and, fortunately for him, is kept intact, being saved from the operation of the law of limitation, by virtue of S. 27 of the Act. The creditor, of course, is, for the moment, kept out of his claim; but, he remains, otherwise, unaffected. The only effect on him would be to create in his mind a lingering rancour against the law.

As for the Board, it is difficult to imagine a more futile body appointed to transact public business. The Board is charged with the duty of "effecting an amicable settlement", a term not defined in the Act, between the "agriculturist" debtor and his creditors and, thereby, to "relieve" him from his "indebtedness". S. 18 (1) of the Act furnishes a clue as to the meaning of the term "amicable settlement"; the creditor is expected to forego a portion of his claim, in order to save the debtor. It is against human experience, however, to expect the creditor to agree. No one will give up his claims willingly, however laudable it may be morally so to do. The Boards have not been invested with any power to bind parties by their decisions. They might have been given the power to take stock of the whole situation and to effect an equitable distribution of the debtor's assets in a manner which while satisfying the creditors to some extent would, at the same time, leave something for the debtor. But, for accomplishing such an object, no amount of moral pressure could help. And it would have been against the scheme of the Act to invest the Board with any powers of compulsion, even in the manner in which ordinary arbitral tribunals are clothed with by the law. The Board is, thus, left in the sorry position of attempting, as best as it can, and by exercise of moral pressure, to accomplish the admirable purpose of the Act, within a period of one year, (S. 17), and, if unfortunately nothing can be done, it has to throw up its hands.

The whole legislation would thus prove incapable of achieving anything substantial. If the "agriculturist" had to be saved, more drastic legislation was surely needed. This was, in fact, furnished in the form of Madras Act IV of 1938, the Statement of Objects and Reasons of which announced, in its opening sentence, that "conciliation had failed" and that new legislation was required. Why, then, was the Act XI of 1936 not merely retained but, on the contrary, extended in its application? There is no justification for keeping in force an enactment which creates merely new anomalies. It behoves the Government not to offer any fillip to such tendencies, especially, at a time, when there are signs, of failing reverence for the law. It is hoped that the Government would have the whole position reviewed and either repeal the Act or have such changes introduced as would make the measure less objectionable and more useful.

PRISON REFORM

BY

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I—Introductory.

Back-ground: Prison reform depends among other things upon (*a*) Conception of crime. (*b*) Conception of punishment. (*c*) Conception of prison.

Causes: Prison reform is now an urgent necessity in all progressive countries because it is demanded by the following causes:

A—Theoretical. (1) *The New Enlightenment and Humanism,* urging humaner treatment. (2) *The New Education,* which prefers liberty to compulsion, abhors corporal punishment, conceives discipline as self-discipline based upon the voluntary self-control of the party, and believes that none is incorrigible and incapable of reform. (3) *Progress of Science,* especially of Anthropology, Sociology, Criminology and Psychology which have revolutionised the conceptions of criminal responsibility and anti-sociality and penal treatment. (4) *Democratic conception of Constitutional Justice*: The problem of justification of the State using force against free citizens has now become acuter than ever on account of the control of the State often by vested interests, and the abuse of the State's power by resort to frequent wars and repression and by failure to prevent the exploitation of the many by the few. Democracy now wants to control and limit the right of the State to use force against its citizens by calling them criminals. (5) *Rise of Revolutionary "Crime"*: Large sections of enlightened modern opinion want a reconstruction of the State in a form which will not be liable to be controlled and exploited by selfish indivials, vested interests, and irreconcilable party cliques. This could only be achieved according to them by revolution and not by constitutionalism. The revolutionaries want to use crime as a weapon of war against the State in its present form and are advocating on philosophical, ethical, and scientific grounds the most violent forms of crime such as anarchist outrages, nihilist assassinations, syndicalist sabotage, and armed insurrection. Crime thus becomes exalted and blessed, the refuge of the morally enlightened instead of the morally debased. The right of the State to oppose this revolutionary crime is now under trial.

B—Practical. (6) *Normal need for reform,* of every institution periodically. (7) *Failure and inefficiency of the old system of prisons*: (*a*) There is no evidence of any

deterrence of crime resulting from prisons either by reduction in the number of criminals or in checking criminality in the community. (*b*) Nor is there evidence of any reformation in the character and habits of the prisoners. (*c*) Positive harm and danger to society results from prisons which really breed criminals, produce recidivists and habituals, destroy personality (by killing self-respect and moral sustaining power), practically ban all decent means of livelihood and make crime the sole means of living, create a beastly class among men, and produce insanity, suicide and drunkenness. (8) *Prohibitive costliness of modern civilised prison system*:—(*a*) Even under the old system each prisoner in England cost about £ 150 per year[1] and £ 5,000 for each reprieved murderer including trial expenses for counsel, expert witnesses, and so on[2]; (*b*) If according to modern requirements separate prisons or wards are to be built for juveniles, adolescents, women, habituals, under-trials, and so on, and if they are to be thoroughly equipped with laboratories, industrial plant, and a corps of experts, the cost of the prison administration would become almost unbearable. (9) *Multiplication of crimes and criminals*:—(*a*) There is a steady growth in the number of criminals due to economic depression and unemployment, irreconcilable political warfare, social dislocation, growth of population, wars, and so on. (*b*) There is also a growth in the number and variety of crimes due to increasing complexity and richness of modern life. Modern traffic, electricity, radio, cinema and aeroplane have each given rise to new offences. (10) *Imprisonment as the residuary punishment*: Imprisonment as a regular form of punishment dates from the eighteenth century in Europe. In recent times old forms of punishment are disappearing and imprisonment is replacing them. Convicts reprieved for murder, those unable to pay fines or furnish security or undergo corporal punishment or who cannot be transported are all sent to prison. Imprisonment has thus become the residuary punishment for the ever growing legion of offences in modern times.

Aims: Prison reform has as its aims:—

(*A*) Reduction of cost which necessitates: (1) Greater efficiency and large scale organisation. (2) Reduction of the number of prisoners. (3) Reduction of the duration of prison life. (4) Economic self-sufficiency of prisons. (5) Development of alternative punishments. (6) Non-officialisation of prison administration.

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1. H. U. Triston, Men in Cages, 1938, p. 228.
2. *Ibid.*, p. 231.

(*B*) Reforms based on the new ideas of criminology. (*C*) Reforms based on the new ideas of penology and (*D*) Reforms based on the new ideas of prisonology.

II—Criminological Problems.

Under this head will have to be considered:

(1) New conception of crime with reference to (*i*) Normality; (*ii*) Anti-Sociality; (*iii*) Fixity; (*iv*) Secularity; and (*v*) Personality. (2) New conception of criminal responsibility. (3) The New Treatment. (4) Etiology. (5) Classification, and (6) Prophylaxis.

(1) *New Conception of Crime.*

(*i*) *Normality of crime*: (1) The popular view of the criminal being an abnormal, horrible, loathsome, dangerous beast has been fed by the abnormal dress and treatment accorded to offenders in Courts and prisons. (2) Modern criminology and psychology suggest that a large part of criminality is the result of some atavistic and pathological abnormality. (3) Barring this, the criminal is a perfectly normal creature, and deliberate crime seems essentially a normal activity of normal persons for satisfaction of normal needs. All men are selfish in differing degrees and work for self-gratification and exploit others for that end. Many moralists maintain that all successful careerists, businessmen, and politicians are with few exceptions unpunished criminals. (4) If man is by nature sinful or wicked, crime would be merely the assertion of this original nature and the loss of the acquired quality of goodness. (5) Revolutionary thought brands the cry against crime as the cry of exploiters and vested interests against the threat of danger to their exploitation and ill-gotten gains. Socialism considers that property is the result of theft and hence its re-theft by the needy would be a blessing. (6) Sociologists like Durkhiem find positive merit in crime in that it keeps society alert and active, and indicates the need for and direction of reform.

(*ii*) *Conception of Anti-Sociality.* (1) Crime is an act or omission which the State punishes as being in its opinion anti-social. The dogmatic fervour with which people are apt to be unthinkingly and unfeelingly crying for punishment of criminals would be justified only if the State's opinion holding any particular thing as anti-social is infallible, immutable, universal, and eternal truth. (2) But history proves that such opinion varies from age to age, country to country, and people to people. Many primitive races of to-day as well as the ancestors of many civilised races in the past have held that cannibalism, incest etc.,

were sacred duties. Conventional morals about married or family life have been weakened by the American phenomena of companionate marriage, universal use of birth-control, free divorce, and by the Bolshevik abolition of marriage and illegitimacy and family life. At Samara in the U. S. S. R., it is recorded that a daughter had two children by her father but the Supreme Court refused to regard the union as criminal and refused sanction for prosecution[1]. Bolshevism has also abolished blasphemy. Every rule of orthodox morality and opinion is now hotly questioned, and violent differences of opinion have arisen about each and all. Modern tendency is clearly opposed to the State selecting one of these opinions and coercing all other opinions. (3) The prevailing political atmosphere very largely determines the opinion of the State about anti-sociality. When irreconcilable religious (*e.g.*, Hindu-Muslim), racial, (*e.g.*, Teuton and Slav in old Austria-Hungary) or political (*e.g.*, Nazi and anti-Nazi) groups wage civil war within a State, mutual assault, hurt, arson, kidnapping, murder, sabotage and sacrilege often come to be regarded as a duty for each party. (4) Modern revolutionary thought is found advocating crime itself as a weapon against the State.

(*iii*) *Fixed criminal types*: (1) As crime is relative to changing opinion and circumstances there can be no such thing as a fixed objective criminal type existing. No man and no act could ever be branded as being always and wholly anti-social. (2) A fixed subjective criminal type is also psychologically impossible. There are no such things as fixed criminal instincts, criminal faculties or criminal emotions. Even an atavist becomes a criminal only if circumstances favour. (3) The idea of a criminal class is itself fallacious. Murderers, robbers, heretics, sex offenders, swindlers, as well as those who drive a cart on the wrong-side, use false measures, build without licence or commit nuisance are all criminals but such a heterogeneous group can never constitute a social class. (4) The same must apply to the idea of a criminal tribe. A tribe is a primitive form of a nation consisting of countless types of individuals. No nation, race, tribe, or country could properly be conceived to be wholly or predominantly criminal. In India a differential treatment is being meted out to many primitive tribes under special penal laws. It is ultimately the civilised man who everywhere drives out these peoples out of their old moorings, and when he finds that they cannot serve him and toil for him he conceives a prejudice against them and calls them dangerous criminals. The reclamation he holds out to them is to

1. Waldemar Gurian, Bolshevism, 1932, pp, 358-9,

evolve them into submissive and useful servants of society. If these peoples are viewed to be akin to children and handled with sympathy and patience and are given adequate economic help they would at once become as upright and happy as others. This economic help in the beginning may be predominantly in the form of doles. When several countries are spending enormous sums as doles even to skilled artizans when unemployed, can we not extend the same to peoples who are quite unable to stand on their own legs in an economic sense?

(*iv*) *Secularity of Crime*: (1) Crime, sin and vice fundamentally differ in their nature, source of origin, province, effect and sanction. Crime is a creature of law. Law is secular or materialistic in the Marxian sense and is the product of the material conditions prevailing at any time. But still the habit of regarding crime both as a sin and a vice persists as a result of which the punishment and treatment to be accorded to a criminal is sought to be determined not on material or secular grounds only but also on moral and religious grounds. (2) Religious people regard crime as a sin produced by the Devil, evil spirits, the Gods, past Karma, Fate, Providence, original evil nature, or evil association. They prescribe punishment as an expiation. The theory of solitary confinement and the rule of silence owe their origin to the Evangelicals who wanted the criminal to be redeemed by silent solitary meditation and repentance. The Avadanas of Asoka allege that he had erected an earthly hell to inflict all the tortures of hell on convicts. (3) Moralists are largely responsible for the atmosphere of horror surrounding criminals and for the harsh treatment meted out to them. A crime judged on moral grounds to be heinous or wicked or involving moral turpitude is being doubly punished. (4) The vested interests in a State naturally benefit from the help afforded by religion and morality in dealing with crime. They justifiy its repression on the plea that it is putting down sin and vice. They doubly punish political crime by declaring that it involves moral turpitude. They call upon the religious authorities to punish such criminals by religious methods also. (5) This intrusion of religion and morality into the realm of secular crime has absolutely no theoretical justification. Both philosophy and science as well as history justify a contrary conclusion. On practical grounds such intrusion does immense harm to religion and morality as well as to secular welfare. (6) Modern science is fast exploding the religious view of crime and punishment, and thereby seriously discredits religion itself. It would thus not be in the interest of religion to invoke the religious view of crime. If it condemns political crime it would

be taking sides. If it condemns economic crime it might become the tool of exploiters. If it condemns crimes of passion it would run counter to modern psychology. If it condemns petty technical offences as sinful it would make itself oppressive. (7) Morality would also get itself tarnished and discredited by seeking to punish crime on moral grounds in the secular field. Morality would then tend to support the doctrine that reasons of State are morally valid. (8) It is therefore desirable that the secular authorities should be prohibited from importing considerations of religion or morality in dealing with crime.

(*v*) *Crime and the criminal*: (1) In modern criminology the subjective view receives greater attention than the objective view of crime. It holds that the criminal and his motives are far more important than the act and results of crime, although it is the crime that makes the criminal and not the criminal the crime (as then if the latter were true there would exist an inborn criminal and crime would be merely his activity). (2) The objective view implies impersonality and punishment based on injury done. All modern penal systems profess to punish crime impersonally—irrespective of the personality of the doer, of his status or motive or condition. No crime can go unpunished. Crime which causes injury to society must be punished by way of retribution or deterrence whoever might be the doer—a child or a lunatic or a sickly man, and whatever might be the circumstances under which it is committed, by ignorance or accident or coercion. Even the father of modern penology, Beccaria, held that crime must be punished according to injury and not intention. (3) But it is the individual who is punished and who suffers and who is to be deterred. He is a normal person like others. Why does he then act so as to injure others? The key to this lies in the discovery of his motives for doing that act. These motives depend upon his psychology (hereditary as well as acquired) and his environment. The professed aim of punishment is to induce the man to control his motives, his psychology, and his environment, so as not to cause any injury to others. But a man's control over his motives, his psychology, and his environment is very limited. The recognition of such a limitation produces a two-fold result. If we are to punish a crime at all we will have to determine how far its doer is responsible as master of his motives, psychology and enviornment and how far these have made him their victim in producing that crime. Since punishment can influence the doer only to the extent to which he can master his motives it is necessary to devise fresh methods of preventing crime other than punishment. Both these problems—the problem of criminal responsibility and the problem of treatment of the criminal—require a

study of the nature and working of all those motives and the psychology and the environment of the criminal. An abstract and objective study of crime although necessary will not form the dominant subject of criminology. Personality is now recognised as lying at the core of criminality. (4) According to this new view the treatment must be not for crime but for the criminal. The treatment must fit the criminal and not the crime. It will have to be individualised and follow the methods of discipline advocated by the New Education. Punishment will dwindle into insignificance and will have to change its character and call itself reformatory treatment or social defence.

(2) *New Conception of Criminal Responsibility.*

(*i*) If a person is to be held responsible for an act of crime, freedom to do it or to avoid it on his part is postulated. He must will and intend the act freely. Criminal responsibility for crime exists only if there is *mens rea* as the English law states or if there is free-will as other systems declare. (2) Freedom means self-mastery. There will be no freedom or responsibility if the man cannot control his motives, his psycholgoy and his environment and if his will acts in ignorance or without free consent (under mistake, misrepresentation, fraud, undue influence, coercion, mental defect). Modern criminology under the influence of Lombroso, Freud and others holds to the theory of Determinism. It considers that mental defects or environmental defects practically dominate the whole life of man and determine all his criminality. This theory of Determinism has relegated to the background the idea of punishable criminal responsibility and makes penal law the law of tutelage of deficient beings. (3) But all the existing penal systems claim to be based upon the theory of free choice. They do not recognise that crime is predetermined but profess that man is largely free to commit or resist crime. (4) But the tragedy of the situation is that these penal systems not merely fail to take note of the fact that mental and environmental defects revealed by modern research almost wholly produce criminality but assume without any effort at proof the existence of free intention and free will in all persons on the basis of a series of fictitious presumptions. Except practical convenience there is no justification or validity for any of these presumptions which are wholly false. (5) These presumptions are three-fold: (*a*) Presumptions of knowledge. Law assumes that everyone has a knowledge of law and also a knowledge of all the consequences of his acts. (*b*) Presumptions of Intention. Law presumes intention from knowledge or from the natural consequences of an act. The will may know an act to be wrong but may

be too weak to resist the doing of it or be forced to do it without intending to do so. An intention to do an act cannot be presumed from mere knowledge. The old theological doctrine that a man must be presumed to intend the natural consequences of his acts utterly breaks down under modern psychological research. (*c*) Presumption of free will. Law assumes every one to be a free agent. This is not true. Free will is not freedom. The will may be free to think or feel in one way but be unable to carry it out. Freedom of will in thought, feeling and action may not always coincide. What is free will? Mediæval theologians argued that a motiveless act is the act of free will. A motiveless man can only be found in a lunatic asylum. No crime could be motiveless. If so it cannot be the act of free will and cannot be punished at all.

(3) *The New Treatment of Crime.*

(*i*) *Failure of penal treatment.* (*a*) Since the province of criminal responsibility under the new theory of Determinism has shrunk into utter insignificance the province of punishment has also disappeared. (*b*) Even the name of punishment has given place to the word, Social Defence. Punishment also is changing its character by becoming reformatory. (*c*) The basis of punishment is fear. It is the fear of danger to vested interests that makes them resort to punishment. They want to rule by fear, by producing fear in the people by means of punishment. (*d*) The true basis of discipline is self-control. A parent, a teacher and a ruler have all to create and maintain discipline. Discipline means control. Control by external force and fear proves both ineffective and harmful. It crushes out personality and will power, deadens the soul, destroys self-respect and moral effort, breeds resistance and desire for revenge, and creates hatred to the object aimed at. Discipline by fear is a labour-saving device; discipline by freedom as under the Montessori system would involve infinite patience and pains at guiding the child to learn self-control. Self-control is based on freedom. Work done for its own sake without regard to other purposes is free. Restraint by fear of punishment is not self-control because the man is bowing to the inevitable and does not feel the need of self-control. Such punishment will not be reformatory and will not make the man give up crime by inner conviction and self choice. (*e*) Punishment to the extent it is retained will have to be according to the degrees of culpability which are to be measured on the basis of the motives and environmental conditions determining the criminal act. (*f*) Crime evokes hatred but punishment would evoke pity thereby proving that punishment is not the proper treatment for crime.

(*ii*) *Subjective treatment.* (*a*) It is now recognised that the treatment must be for the individual and not for crime. It will take note of his motives, mental traits and conditions of life. (*b*) The doctrine of punishment fitting the crime (to be examined later) is no longer tenable. Punishment must fit the criminal for reforming his character.

(*iii*) *Individualisation of treatment.* The new treatment will deal with each individual criminal according to his needs. It will not be one uniform method for all but will admit of infinite variation. Mere fear of discipline will not admit of individualisation.

(*iv*) *Methods of treatment.* These are (*a*) Penological—infliction of punishment. (*b*) Reformatory—aiming at reforming the character of the criminal, making him a better man and a better citizen, teaching him a useful trade or vocation, improving his education, inculcating self-control and self-respect, and making it impossible for him to return to crime. (*c*) Psychopathic and Sociological—aiming at curing the mental defects and reforming the environmental conditions and at treating the criminal as a patient or a child.

(4) *Etiology of Crime.* (*a*) The causes of crime can only be investigated after settling the nature of crime. Crime proceeds from a complex set of motives for self gratification. The causes producing criminality are psychological, organic, racial, physical, social, economic, political, religious and ideological. Of these the psychological, organic and economic causes admit of far-reaching research and study in modern times. (*b*) The Italian School of Criminology led by Lombroso emphasised Heredity as a factor in crime. Biological atavism was held to be the basis of all the atrocious crimes. Such criminals could only be treated as patients. This school has enabled us to discover that a good deal of crime is due to some kind of mental defect hitherto undetected or unnoticed or unknown. Freudian Psychology has emphasised the same conclusion. (*c*) The French Environmental School of Criminology traces crime predominantly to defective environment. It was accepted by all believers in progress by education and transformation of the envoirnment. Socialists who hold that crime is the result of the exploitation of vested interests also support this view.

(5) *Classification of crimes and criminals.*

(A) *Classification of crimes.* (*i*) It is necessary to distinguish murder from a foot-path offence. (*ii*) The classifications of crimes suggested by thinkers and Penal Codes are countless in number. (*iii*) The Indian Penal Code classification of offences into cognisable, compoundable, summarily triable and so on is

unscientific and irrational. (*iv*) The English classification into treason, felony and misdemeanour is not happy. The German classification into offence, misdeed and delinquency is better. But the French classification into crimes, misdemeanours, and contraventions is about the best and may be adopted. (*v*) Classification of crime based upon motive takes us into the classification of criminals. (*vi*) Gandhiji's classification of crime into crime with or without violence is simple in appearance but very complicated in its interpretation. To Gandhiji, violence would be both physical and moral violence. Some of his followers hold that political offences do not admit of any moral violence and should not be punished if no physical violence is involved. Moral violence is a metaphysical abstraction and cannot serve as the basis of a scientific classification. (*vii*) Nevertheless the classification based upon motive and physical violence would be about the best that we can have for the penal regulation of crime. (*viii*) Political crime is to be distinguished from other crimes from its being committed from political motives. Political crime in India consists of waging war, sedition, political assassination, political dacoity and arson, civil disobedience (which includes violation of orders under Ss. 107, 108 and 144, Criminal Procedure Code, and Police Regulation), press offences, revolutionary crime, labour agitation offences, and perhaps Military offences.

(*B*) *Classification of criminals.* (*i*) The numerous classifications of criminals as congenital, instinctive, circumstantial, passional, recidivist, professional, habitual, incorrigible and so on are of great practical significance. (*ii*) Classification according to degrees of culpability: (1) Real criminals. Those who can be held to be really responsible for the crime committed by modern criminological standards—(*a*) True criminals. Those who are guilty of both criminality and crime. (*b*) Pseudo-criminals. Those who are guilty of crime without criminality such as chance criminals or juvenile criminals. (2) Nominal criminals. Those who commit crime as victims of some mental or environmental defect and are nominally culpable. (*iii*) The three methods of the new treatment of criminals are organically connected with this classification of criminals. The Psychopathic treatment applies primarily to Nominal criminals. The Penal treatment ought to be confined to the True criminals only and by way of reformation.

(6) *Prophylaxis.*

(*i*) None will deny that prevention of crime is better than its cure. (*ii*) Some of the means of prevention are: (*a*) General education of the people. (*b*) Economic improvement; eradication

of poverty and unemployment. (*c*) Improvement of the environment. (*d*) Growth of tolerance and good will. (*e*) Moral education. (*f*) Growth of respect for law: Democratisation of the State and society. (*g*) Medical and psychical treatment of suspects and offenders. (*h*) Social reform. (*i*) Labour welfare. (*j*) Police prevention.

SUMMARY OF ENGLISH CASES.

BATTING *v.* LONDON PASSENGER TRANSPORT BOARD, (1941) 1 All.E.R. 228 (C.A.).

Limitation—Period of limitation extended by later Act after expiration of the period under earlier Act—Amendment of statement to claim making out a new cause of action—Not to be allowed.

On 11th December, 1939, the plaintiff was involved in an accident in which she was injured by a tramcar belonging to the defendants—a public authority. The period of 6 months under the Public Authorities Protection Act then in force within which an action had to be commenced expired on 11th June, 1940. The writ was issued on 11th April, 1940, claiming damages for negligence without specifying the particular type of negligence of which the defendants were alleged to have been guilty. On 28th May, 1940, a statement was put in making it clear that the complaint against the defendants was one of negligent driving by the tramcar driver. On 1st November, 1940, an application for leave to deliver an amended statement of claim was made. The amendment sought to set up a new and different case that defendants were negligent in maintaining the roadway.

Held, that the amendment set up an entirely new cause of action and was barred under the Act as it stood. The introduction of a longer period of one year's limitation by an amendment to the statute, which came into operation 19 days after the limitation of 6 months under the provisions of the unamended Act had expired cannot be of any avail as the cause of action was already completely barred.

MURFIN *v.* ASHBRIDGE & MARTIN, (1941) 1 All.E.R. 231 (C.A.).

Practice—Insurance company given control of proceedings by or against insured—Insurers—No locus standi *in actions to appeal in own name.*

Though insurers had been given by the policy, control of the proceedings and could take any step in those proceedings in the

name of the defendant, yet they are not parties to the action and no application or appeal could be made in their own name.

Re., WEBB, BARCLAYS BANK, LTD. *v.* WEBB AND OTHERS, (1941) 1 All.E.R. 321 (Ch. D.).

Insurance—Life insurance—Parent effecting policies in name of his children—Death of parent leaving will—Person entitled to the policies.

During his lifetime the testator took out two insurance policies on the respective lives of his two children. All the premiums on the policies were paid by the testator down to the time of his death and on the death of the testator the question arose as to whether the money payable under the policies would form part of the testator's estate or whether the child named in each of the policies was entitled to the money assured. In the proposal form the father was described as the grantee who was desirous of effecting an assurance on the life, on behalf and for the benefit of the person therein named as "the life assured", namely, the child.

Held, that the life assured was the person entitled to the money payable under the policy and if there were any further payments to be made the person whose life was assured was the person to make those payments. On the wording of the policy there was sufficient to establish a trust in favour of the children as against the father who no doubt effected the policy.

(1924) 2 Ch. 348 and (1938) Ch. 799, distinguished.

Re., GALE, GALE *v.* GALE AND ANOTHER, (1941) 1 All.E.R. 329 (Ch. D.).

Will—Bequest—Gift during widowhood—Beneficiary remaining spinster—Effect on gift.

The testator who had a wife had also co-habited with another woman *D. M. L.* In his will he directed his trustees to allow *D. M. L.* to enjoy "during her widowhood" a certain dwelling house and also to pay her 25s. per week for a period of twelve years. *D. M. L.* though she had children by the testator was never married to him. On a construction of the will,

Held, that the gifts failed as the period for which provision was made could never exist.

Re., MYLINE, POTTER *v.* DOW, (1941) 1 All.E.R. 405 (Ch. D.).

Will—Religious trust for benefit of missionaries holding certain beliefs—Validity.

A trust was created for the benefit of missionaries by will and a clause in the will provided that "no person shall be eligible for any benefit under the trust unless he or she shall be a Protestant in religion and a whole-hearted believer in the divinity of Christ and the full inspiration of scripture."

Held, that the clause differed from a forfeiture clause and as it was possible for the trustees by inquiries to ascertain whether a particular person was suitable the condition was not impossible to fulfil and the gift was not void for uncertainty.

(1940) Ch. 385=(1940) 1 All. E.R. 632, Dist..

Re., GREAT EASTERN ELECTRIC Co., (1941) 1 All.E.R. 409 (Ch. D.).

Companies—Voluntary winding up—Debts incurred before and after—Priorities.

A liquidator in a voluntary winding up may without any sanction carry on the business of the company so far as it may be necessary for the beneficial winding up thereof. If, in the proper exercise of this statutory power, he incurs obligations, those to whom he incurs them are entitled to be paid out of the assets of the company in priority to its creditors at the commencement of the winding up. There can be no question of the two classes of creditors ranking *pari passu*. If the condition is fulfilled the post-liquidation creditors come first. If it is not they do not come in at all, or at any rate not until the pre-liquidation creditors have been satisfied.

FREDENSEN *v.* ROTHSCHILD, (1941) 1 All.E.R. 430 (Ch. D.).

Deed—Rectification—Evidence of mistake—Burden.

A person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution and further he must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case mutual and concurrent intention of parties must be established.

DUNCAN *v.* CAMMELL LAIRD & Co., (1941) 1 All.E.R. 437 (C.A.).

Practice—Discovery—Production contrary to public interest—Privilege.

Where the head of a department of State claims privilege for production of documents, the Court must give effect to that claim.

HORN *v.* SUNDERLAND CORPORATION, (1941) 1 All.E.R. 480 (C.A.).

Land Acquisition—Compensation—Disturbance of business—Compensation for—Right to.

Under the Acquisition of Land (Assessment of Compensation) Act the person whose business premises are compulsorily acquired is entitled to compensation but since the value of the land as building land could only be realised by the removal of the business, compensation for disturbance of business could not be awarded because the value of the land as building land exceeded its value as agricultural land plus the value of the minerals plus the loss by disturbance. If the sum of these exceeded the value as building land then the owner would be entitled to the difference. (1941) 1 All. E.R. 166, reversed in part.

MICHEL HABIB *v.* SHEIKH SULEIMAN, (1941) 1 All. E.R. 507 (P.C.).

Contract—Agreement to pay on breach a certain amount as liquidated damages—Damages or penalty—Test for enforceability.

Agreed liquidated damages if to be enforced must be the result of a "genuine pre-estimate of damages." They do not include a sum fixed *in terrorem* covering breach of contracts of many varying degrees of importance the possible damages from which bear no relation to the fixed sum, and which obviously have at no time been estimated by the contracting parties. When the sum agreed is a penalty, whatever it may be called in the agreement, then the penal stipulation will not be enforced.

CORBETT *v.* DUFF, (1941) 1 All. E.R. 512 (K.B.D.).

Income-tax—Professional football player—Receipt of proceeds of benefit match—Taxability.

If a payment to the assessee though voluntary is remuneration for an office or employment, it is taxable, but, if it is personal in the sense that it is given to the person not as a holder of an office or employment but as a personal testimonial, it is not. The line is often difficult to draw.

Where in the case of a professional foot-ball player taking part in a benefit match, payments though not obligatory, are expected, are generally asked for, and are usually accorded, the payment must be treated as remuneration for employment as a foot-ball player.

GOULD *v.* MCAULIFFE, (1941) 1 All. E.R. 515 (K.B.D.).

Tort—Dog known to be dangerous—Injury by—Liability of owner.

A licensee of a public house who has a dangerous dog, ought to take steps to see that that dangerous dog is kept away from customers of his inn behaving reasonably and without negligence. The owner of the animal ought to see that it is so secure that it cannot attack any one who is on his premises or who mistakenly steps one or two yards through an open gate therein. Where through the owner's failure of such duty the plaintiff is injured by the dog, the owner is liable.

HASELDINE *v.* DAW & SON, LTD., (1941) 1 All.E.R. 525 (K.B.D.).

Landlord—Defective condition of lift—Liability to visitor of tenants—Liability of repairer to users of the lift.

The plaintiff, the managing clerk to a firm of solicitors, in the course of his professional affairs went to a block of flats, owned by *X* and managed by *Y* and Co., in order to call upon a tenant living there. Owing to the defective condition of the hydraulic lift he sustained severe injuries and brought an action for damages against *X* the owner, *Y* & Co., the managers and *Z* the lift engineers who were responsible for "inspecting the lift every calendar month during working hours to adjust, clean and lubricate the mechanism, to provide the cleaning materials and necessary lubricants and to attend also at all reasonable working hours to adjust the mechanism in case of stoppage or irregular running between the periodical visits." The day before the accident the lift engineers had attended and adjusted the mechanism.

Held, that the plaintiff was not an invitee for the purposes of the occupier. He was only permitted to use the lift for his own purposes to call on a tenant and so was a licensee and the only duty of *X* was to warn him of any danger of which he had actual knowledge.

(2) In undertaking the carriage of the plaintiff in the lift, *X* was under a duty to use reasonable care to provide a vehicle reasonably safe for the conveyance of the plaintiff, as well as to exercise reasonable care in the conduct of that vehicle throughout the course of the journey.

(3) The complete maintenance of the lift not having been entrusted to the independent contractors *X* had not discharged his duty to see that the lift was reasonably safe and *X* was accordingly liable.

(4) As regards the lift engineers they were also liable to the users of the lift because the accident was due to their failure through their workmen to do their contractual work with reasonable skill and care.

KENT *v.* EAST SUFFOLK CATCHMENT BOARD, (1941) 1 All. E. R. 527 (H.L.).

Tort—Sea wall—Repair by statutory authority—Negligence in—Damage to plaintiff's land due to inundation of salt water—Liability.

As the result of the defendants' negligence in the exercise of their powers to repair (failure to properly repair a sea wall which had collapsed) the plaintiff's pasture land was inundated by salt water. In a claim for damages,

Held (reversing the majority view of the Court of Appeal, Lord Atkin dissenting), that a Catchment Board which is under no statutory duty to landowners within its area is never liable to one of them either for total neglect to exercise its statutory powers or (if no more is proved) for exercising them with lack of efficiency or with too little zeal or dispatch.

Re., SAMUEL: JACOBS *v.* RAMSDEN, (1941) 1 All.E.R. 539 (K.B.D.).

Will—Condition for forfeiture of legacy on "Marriage with a person who is not of Jewish parentage and Jewish faith"—Validity of condition.

A condition in a will for forfeiture of legacy in the case of the marriage of the testator's daughter to a person not of the Jewish faith is void for uncertainty.

(1940) 1 Ch. 385, followed though doubted.

Re., DESTONE FABRICS, LTD., (1941) 1 All. E.R. 545 (Ch. D.).

Companies—Company in insolvent circumstances—Issue of debentures creating floating charges—Arrangement not bona fide *for benefit of company—Validity—Tests.*

Where debentures are issued by a company in insolvent circumstances within six months before its winding up, the test for deciding the validity of such issue is whether the transaction is to be regarded as one intended *bona fide* for the benefit of the company or as one for the benefit of certain creditors of the company.

Where the effect of the issue of the debentures is to procure the payment to certain of the directors in preference to other

creditors of the company of the sums due to them the floating charge created by the debentures is wholly invalid.

NEWELL *v.* GILLINGHAM CORPORATION, (1941) 1 All. E.R. 552 (K.B.D.).

Master and Servant—Apprentice—Dismissal of, for turning "conscientious objector"—Liability of master for breach of covenant.

A clause in an apprenticeship deed provided "should the apprentice be wilfully disobedient or be slothful or negligent or otherwise grossly misbehave himself the master may discharge the apprentice from service."

The apprentice became a conscientious objector and as a result the master discharged him. An action was commenced to recover damages for breach of covenant. It was also found that the apprentice's conduct would irritate his fellow workmen and lead to loss of employer's time.

Held, that the employers were not entitled to terminate the contract of apprenticeship and were liable for breach of covenant.

WESTON *v.* LONDON COUNTY COUNCIL, (1941) 1 All.E.R. 555 (K.B.).

Factories Act—Technical institute carried on by local authority—If factory under the Act.

A technical institute run by local authorities is not a factory within the meaning of the Factories Act and the local authority is not liable for an accident to a pupil of the institute while working a wood cutting machine. Where the pupil disobeyed the instructions given to him and brought about the accident there is no common law liability on the part of the local authorities carrying on the technical institute.

HICHENS HARRISON WOOLSTEN & CO. *v.* JACKSON & SONS, (1941) 1 All. E.R. 562 (K.B.D.).

Stock exchange—Brokers right to indemnity from vendors repudiating their contract.

Where the vendors repudiated their contract the brokers are bound to produce other stock which could be registered in the name of the buyer and the brokers are entitled to be indemnified by the vendors in respect of the liability they have incurred to produce other stock.

LANCASTER MOTOR CO. (LONDON), LTD. *v.* BREMITH, LTD., (1941) 2 All. E.R. 11 (C.A.).

Company in liquidation—Unsuccessful proceedings by and order for costs against—Bank account in liquidator's name—If can be attached.

Where there was an order for costs against a company in liquidation which took out unsuccessful proceedings, the persons entitled to costs sought to attach moneys in a bank account standing to the credit of the liquidator.

Held, that there was no relationship of banker and customer or debtor and creditor between the bank and the company and the amount cannot be attached.

(1936) 2 All. E. R. 905 not followed.

(1938) 2 K.B. 801 relied on.

JOTTINGS AND CUTTINGS.

Gray's Inn Hit.—For Grey's Inn bombs are no longer glass-case curiosities in the Library faintly recalling old unhappy far-off things and battles long ago. It has suffered like its sister Societies from this year's thunderbolts. Its gardens are pitted in several places with bomb holes of various sizes. The house where the gardener lived for more than twenty years is wrecked. Half the terrace railings are blown away, and a house in Gray's Inn Square has been hit. Verulam Buildings and Raymond Buildings have been damaged by blast and no part of the Inn has its glass intact. It is to be supposed that these misfortunes must be put down as accidental since at all times it would have been hard to bring the Inn within the definition of a military objective. "I hold your Walks to be the pleasantest place about London and that you have there the choicest society," wrote an Englishman abroad in 1621, and nearly two centuries later Lamb wrote: "They are still the best gardens of any of the Inns of Court, my beloved Temple not forgotten—have the gravest character, their aspect being altogether reverend and law-breathing. Bacon has left the impress of his foot upon their gravel walks". The gardens have, indeed, changed since Bacon planted there seventy-one elm trees at 9d. each, eight birch trees at 1s. 6d. each, sixteen cherry trees at 1s. each, woodbine, eglantine, roses, vine cuttings, pinks, violets and primroses (a hundred and twenty-five "standards of roses" cost him but 12s. 6d.). Though the lawns are still green and delightful, not for many years has that vanished fragrance perfumed the air of Holborn. It is long since peace, sometimes as destructive as war, levelled Bacon's Mount and the pleasant summer-house thereon, and later covered the site with the forbidding

bulk of Raymond Buildings. Lamb cursed the equally grim Verulam Buildings for an encroachment which left no trace of a one-time bowling green fenced with double quick-set "so that no cattle might come in".—*S.J., 1941, p. 20.*

The Square.—Gray's Inn Square is an excellent starting point for meditations on the rebuilding of London. Accustomed to streets which Victorian and modern commercial buildings have generally left with no features but pretentious disproportion and incongruousness, the eye finds it wholly delightful. How different architecturally was that vanished London in which it seemed unattractive, when Dickens penned his venomous attack upon its "ugly tile-topped tenements" calling it the "Sahara desert of the law". The lack of love that he had for the law clouded his judgment, and the great Sir Samuel Romilly, critical though he was of much in the legal world, so that the sight of his fellow lawyers spoilt New Square, Lincoln's Inn, for him, yet found his chambers at No. 6 Gray's Inn Square very pleasant and almost rural in 1779, with but one row of houses from there to Hampstead.—*S.J., 1941, p. 20.*

A Quaint Vice-Chancellor.—In the pages of various compilers of legal reminiscence many quaint stories have come down to us of Vice-Chancellor Malins; indeed, it was said of him that when in court he was always able to command a "good house," showing a certain amount of sport under the stimulating attacks of Mr. Glasse and Mr. Napier Higgins, who at that time were the chief protagonists in his court. Before reaching the Bench, Malins had for some time sat in Parliament, and every now and again when on the Bench he would allude to that fact despite its total irrelevancy; indeed, once we are told that, having oracularly interposed to say, "That reminds me of a point I once raised in the House of Commons," he got no further, for Mr. Glasse brusquely interposed with the withering sneer, "We have not come here to listen to your Lordship's experiences"—an observation which brought a flush to the Vice-Chancellor's cheek and a muttered interjection, but no more.—*L.T., 1941, p. 46.*

His costly garrulity.—We are told that on one occasion this failing of his cost him dear. It happened in this wise: arriving late in court, he explained that this was due to his having started for his morning canter in the Row without his watch, which accidentally had been left at home, and in consequence he had dallied longer in the Row than usual. An hour or so after this avowal of

the reason for the delay in taking his seat a person appeared at his Lordship's house and informed the butler that he had been sent from the court for the Vice-Chancellor's watch. Not unnaturally the butler was a little suspicious but, finding the watch on the Vice-Chancellor's dressing-table, and doubtless thinking that his master would be greatly inconvenienced without his time-keeper, he handed the watch to the pseudo-messenger, who quickly hurried off, but not in the direction of the Vice-Chancellor's court in Lincoln's Inn.—*L.T., 1941, p. 46.*

Baron Pollock.—Those who have passed the meridian of life may recall the somewhat ancient figure of the last of the Barons to remain on the Bench, Baron Pollock, a son of the former Chief-Baron, and few would have credited him with the cracking of jokes, but at least once he achieved success in this domain. The case on which he was engaged had reference to the subject of what constituted "necessaries" for a minor. The leader on one side was described by the narrator of the story as a rather decrepit and elderly Q. C. whose marriage to the somewhat mature daughter of a patrician house had occasioned a certain amount of ironical comment on the part of his learned friends. The other side was led by a silk much younger than his opponent and having over him decidedly the advantage in the matter of olive branches. During the hearing a good deal of badinage was indulged in, the old Q.C. contending that a piano constituted a "necessary", while his opponent maintained that it was not. The former began rather pompously to refer to his married experience, a subject which he was somewhat fond of introducing on account of the augustness of his alliance, and said, "I have always understood that a piano was a 'necessary' for anyone of the position the minor in this case occupies." Upon this his opponent rose and declared that he, having been married twenty years and being the father of a family, knew something about this, whereas his learned friend against him had not been equally fortunate, for he had no family. This brought the other to his feet with an indignant protest, but at this stage Baron Pollock quietly interposed and threw oil upon the troubled waters by remarking, "Gentlemen, I think we had better confine ourselves to the issue in this case".—*L.T., 1941, p. 46.*

BOOK REVIEWS.

THE LAW OF BENAMI TRANSACTIONS, by A. Ghosh, 3rd Edition, 1941. Published by Eastern Law House, Ltd., Calcutta, 386 pages. Price Rs. 5.

Benami transactions constitute a feature peculiar to Indian life around which has clustered a mass of case-law. The pre-

sumption of advancement arising in English law whenever property is purchased by a person in favour of his wife or child is no doubt inapplicable in India in the case of Hindus and Muslims, but there is in operation another principle, the doctrine of intention to benefit, by which it is permissible to show that the ostensible vendee is also intended to be the real and beneficial owner of the purchased property and not a benamidar or *alias* for the person who provided the purchase-money. The book under notice provides a lucid analysis of the judicial decisions under appropriate headings, serving to illumine the real position of the benamidar *vis a vis* the true owner and the outside world, and to explain the limits within which the doctrine of benami will be recognised by the Courts. Case-law down to 1941 has been noticed and the treatment of the subject is full and helpful. The book is bound to be of much assistance to the busy practitioner.

LAW RELATING TO COMPANY SHAREHOLDERS IN INDIA, by H.R. Mehrotra, G.D.A. Published by the Progressive Publishing Co., Calcutta, 1941. Price Rs. 3-8-0.

It was Ramsay Muir who remarked that at the present time ownership of property stands divorced from responsibility, that property has become essentially a matter of stocks and shares, that the control by shareholders is a fiction and that the directors, in effect electing themselves, wield enormous power often in an irresponsible manner. That the criticism is not unwarranted is borne out by a number of remarkable cases, like *Rex* v. *Kylsant, etc.* It is therefore eminently desirable, if not altogether imperative, that the shareholders should know their respective rights and liabilities, how their moneys are invested and applied and in what manner they can exercise effective control over the directors of a company and its policy. This book by Mr. Mehrotra affords the means of obtaining such knowledge as regards companies in India. The arrangement of topics in the book is on sound lines. The provisions of the Indian Companies Act, 1913 as amended in 1936, as affecting the shareholders are fully and faithfully explained and their implications lucidly brought out in the light of decisions, Indian and English. Appendix I which contains a summary of the various rights and liabilities of company shareholders is practically the essence of the whole book. The book is written in a simple style throughout and sets out in an admirable manner what every shareholder ought to know. We are sure that the book will prove useful not only to those to whom it is chiefly intended but also to the members of the legal profession.

THE
MADRAS LAW JOURNAL

II] SEPTEMBER [1941

REVIEW OF MEMORANDA ON THE HINDU LAW OF SUCCESSION ISSUED BY THE HINDU LAW COMMITTEE.

Codification, the object. The Hindu Law Committee are the latest advocates of the advisability and desirability of codifying the principles of Hindu law. The Hindu system of law is no doubt a complicated structure, the various parts of which are interconnected with and run into each other at every stage. Still one can agree with the Committee that neither regional or other differences nor constitutional difficulties should present insuperable obstacles in this respect. A common code of laws is as much essential to Hindu unity and homogeneity as a common language or common culture. It is eminently desirable to achieve uniformity in law wherever possible and tolerate divergences wherever inevitable. The Committee have in this connection issued four Memoranda containing a general survey of the Hindu law of succession and embodying their proposals—of an exploratory character only—for the codification of that branch of the law. The proposals are generally such as will command fairly wide acceptance.

Memorandum I deals with the Mitakshara law of intestate succession of males to the property of males unmodified by statutes. The rules are expected to yield results "sufficiently accurate for all practical purposes" and be "exhaustive in the sense that they furnish a decisive test in every imaginable case." It is claimed that they involve "no change in the traditional Mitakshara law of male succession" and are merely "restating the old principles in a more precise form."

Memorandum II deals with the succession of female heirs to the property of a male in the Mitakshara school. It is declared that the laws of succession should be "in aid of our ideals of marriage," for "a lofty ideal of marriage ill-consorts with a low standard of property rights." For this purpose according to the Committee it is the ideas of Jaimini rather than those of

Baudhayana that should form the basis. Accordingly the Committee have suggested that no woman shall be disqualified for succession merely by reason of her sex. Nor is any limitation to be imported into the nature of the estate merely because it is held by a woman. Radical though these principles appear at first sight, they have to be taken in the light of the statement in Memorandum IV that on the death of the female heir, the inherited property shall devolve on the heirs of the last male owner of such property. The heirs other than widow, mother and daughter enumerated in the Mitakshara and the Mayukha as well as those coming in by virtue of special legislation like Act II of 1929 and Act XVIII of 1937 are to be accommodated. One special rule is made for women who are widows when succession opens, namely, that they shall take in the places which their husbands would have occupied had they been alive at that time. Also to remove any injustice occasioned to the daughter by the passing of the Deshmukh Act, the unmarried daughter is to find a place in the "simultaneous succession" group of heirs.

Memorandum III deals with intestate succession under the Dayabhaga law and Memorandum IV deals with succession to *stridhana* property.

Review of the proposals relating to the Mitakshara law of succession to males.[1] The rules set out at the end of Memorandum II constitute the rules which the Committee would recommend

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[1]According to the Committee the whole law of Mitakshara succession to the property of males can be put in the form of the following rules:—

"*Rule* 1. When a Hindu male governed by the Mitakshara school dies intestate in respect of heritable property, it shall devolve in the following order on the following classes of relations, namely:—

I The "enumerated heirs", that is to say,

1. (*a*) Widow.
   (*b*) Son.
   (*c*) Son of pre-deceased son.
   (*d*) Son of pre-deceased son's pre-deceased son.
   (*e*) Widows of (*b*), (*c*), and (*d*).
   (*f*) Unmarried daughter (all succeeding simultaneously and with equal rights).
2. Married daughter.
3. Daughter's son.
4. Mother.
5. Father.
6. Brother.
7. Brother's son.
8. Father's mother.
9. Sister.
10. Father's father.
11. Son's daughter.
12. Daughter's daughter.

for adoption in case the Mitakshara law of succession is for any reason to be separately codified. The rules given are simple. In some cases they have departed radically from the existing law. Blood-relationship as measured by line and degree seems to be the main principle on which the rules are founded.

The Committee's suggestion that no woman shall be disqualified for purposes of succession by reason of sex, means that every female relation who stands in the same degree of kinship to the deceased as a male heir will be entitled to rights of heirship. Also, except in the case of the "enumerated heirs," a male and a female heir standing in the same degree of kinship to the deceased will share equally. Thus where the surviving relations are paternal uncle's son and paternal uncle's daughter, the latter will be an agnate according to the Explanation at the end of Rule 1 and both being heirs in the same degree will take equally. These principles mark a considerable departure from the existing law but should be welcome in so far as they enable all blood relations of the deceased irrespective of sex or degree to take before the property of a person can pass by escheat.

The principle that outside the circle of "enumerated heirs" each class will exclude the next means that agnates of the deceased, however remote, will exclude the cognates of the deceased,

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13. Sister's son.

II. *Agnates of the deceased* (*i.e.*, persons related to him wholly through males) other than those already enumerated under I.

III. *Cognates of the deceased* (*i.e.*, persons related to him, but not wholly through males) other than those already enumerated under I.

Explanation:—A woman who is related to the deceased wholly through males (excluding herself) is an agnate and any other female relation a cognate for the purposes of these rules.

Rule 2. (*a*) Each class excludes the next and within each class the earlier group excludes the later.

(*b*) In each group, persons related to the deceased by the half-blood succeed immediately after persons related by the full blood.

Rule 3. The order of the heirs in classes II and III shall be determined by the next four rules.

Rule 4. Of two heirs, the one who is nearer in ascent succeeds first.

Rule 5. If the two are equally near in ascent, the one nearer in descent succeeds first.

Rule 6. If the two are equally near both in ascent and descent, the one who is in the male line of ascent succeeds first.

Rule 7. If the two are equally near in ascent and descent and the chain of ascent, if any, is the same in both cases, the one who is in the male line of descent succeeds first.

Rule 8. A woman who is a widow when succession opens (except the widow of the deceased himself) takes the place which her husband would have occupied in the order of succession if he had been alive at the time, without prejudice to any other rights which she may have."

however near. Thus a son's daughter's son will have to yield place to the great great grandfather's great great grandson. No doubt this is also the present position. But as has been pointed out in *Kalimuthu* v. *Ammamuthu*,[1] persons like the son's daughter's son, daughter's daughter's son and daughter's son's son deserve to be given higher places in the line of succession. Either the category of "enumerated heirs" will have to be enlarged so as to admit such persons, or the rule that agnates shall exclude cognates should be made to govern only as among descendants in the same line.

The son retains his place of primacy as heir, but his share gets further attenuated. He is to share equally not only with the widow of the deceased and the widow of a predeceased son etc., but also with the unmarried daughter. This makes little allowance for the round of spiritual duties cast upon a son by the principles of Hindu religion which gave him his place of primacy. There is no prescription in the Memorandum concerning the adopted son and the special rules relating to his share. Nor is there any, in regard to the anulomaja son in places where such marriages are valid. Again what is the position of a *dasi putra*? Is it the intention of the Committee to deal with these matters when the other branches of Hindu law like marriage, adoption etc., are dealt with? The exclusion of the illegitimate son from succession, if intended, will be in accordance with the present day Hindu public sentiment and will remove a needless distinction in law resting upon difference in caste.

The widow and other female heirs are given absolute estates in inherited property subject however to such property devolving on their death on the heirs of the last male owner. The change is radical and in view of the automatic cutting down of the son's share entailed by the provision for equal rights both for the unmarried daughter and the heirs introduced or benefited by the Deshmukh Act, it may evoke opposition. It will be better if provision is made for a larger share to the son. It should also at any rate be made clear that where there is more than one widow left by the deceased they will only cumulatively take the share of a son.

The unmarried daughter is equated with a son. One ought not to object to the daughter receiving a share. Equal share for her with the son is, however, more than what even the Muslim law allows. To give her half the share of a son may placate opposition. It will facilitate her admission into the group of heirs taking by simultaneous succession. In fact it might very well be made a rule of law that as among heirs standing in the same degree of kinship to the deceased the sharing of the inheritance shall or-

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1. (1934) I.L.R. 58 Mad. 238.

dinarily be in the ratio of 2: 1 male to female. Again why leave the married daughter out of the "simultaneous succession" group of heirs? Is it because the unmarried daughter's share is in lieu of her right to maintenance and marriage expenses? A widowed and destitute daughter would certainly require protection from her father's family. So why not admit her into the circle of heirs taking by "simultaneous succession"? It will also be better if the theoretical rule of preference among married daughters according to their relative affluence or indigence is abolished.

The 8th Rule, if strictly applied, would result in the step-mother, brother's widow and brother's son's widow superseding father's mother, father's father, son's daughter and daughter's daughter etc., as it is not stated that the operation of the rule is to start only after the exhaustion of the "enumerated heirs." To strictly apply the Rule will be to ignore the principles of natural love and affection, for the sake of logic. It is essential that the 8th Rule should be made to operate only after the class I heirs are exhausted.

Sister is preferred to son's daughter etc. The preference will not find acceptance. It is in Bombay that it has been held that in spite of the Act II of 1929 casting the preference the other way the sister would still retain her place of primacy as one accorded by *custom* to her in that presidency. If a son or daughter is preferable to the father as heir, consistently, the son's daughter and the daughter's daughter should have priority over the father's daughter. The dictates of natural love and affection also point to that result.

Rule 3 read with Rules 4 & 5 prescribes the order of succession among agnates. The distinction between gotraja sapindas and samanodakas is eliminated and the latter may sometimes defeat the former. Such cases, however, will be rare. Also when once the circle of relations bound by ties of love and affection is passed, it matters little which of two heirs, who relatively speaking are not close to the deceased, succeeds. There can thus be little objection to the adoption of the rules of agnatic succession as suggested by the Committee.

Cognatic succession is rescued from uncertainty and indefiniteness. The guidance afforded by the Mitakshara was slender. The rules deduced were often arbitrary and in their application produced conflict of judicial opinion. The rules proposed by the Committee are therefore to be wholly welcomed in this respect.

The 8th Rule, by which a woman who is a widow when succession opens takes the place which her husband would have occupied in the line of heirs had he been alive at the time, must have its operation started only after the exhaustion of the "enu-

merated heirs". Also the meaning of the expression "takes the place" should be made clear. Does it purport to import the theory of representation for all purposes or substitution in a restricted degree only?

The rules of exclusion from inheritance will have to be indicated. The position of disqualified heirs and the effect of the subsequent removal of the disqualification will have to be defined. What will be the status and rights of children born of a widow remarriage in regard to property left by the children of the first marriage will have to be stated. The rule governing succession by preceptor, pupil, fellow student etc., which is still current may well be abolished. How succession to impartible estates should be regulated as among heirs of the "simultaneous succession" group or as between heirs in the same degree of relationship but belonging to different sexes, should also be specified.

Proposals as regards the Dayabhaga School reviewed[1]. The Committee's proposals are founded on an acceptance of Sarkar Sastri's exposition of Jimutavahana's theory in preference to the application of the spiritual capacity principle as worked out by Dr. Sarvadicari. The rules as stated by the Committee are to be welcomed inasmuch as their adoption will cause the least divergence between the Mitakshara and the Dayabhaga schools.

Proposed Rules for All India examined[2]. The scheme is admittedly a compromise between the Mitakshara and the Daya-

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[1]The Dayabhaga rules as suggested by the Committee are:—

"*Rule* 1. When a Hindu male governed by the Dayabhaga school dies intestate, his property shall devolve in the following order on the following classes of relations, namely:—

I. The enumerated heirs" that is to say,

(*a*) (1) Widow, (2) son, (3) son of predeceased son,
(4) Son of predeceased son's predeceased son,
(5) Widows of (2), (3) and (4).
(6) Unmarried daughter (all succeeding simultaneously and with equal rights),
(7) Married daughter, (8) daughter's son.

(*b*) F, M, FS, FSS, FSSS, SD, DD, FD, FDS;
(*c*) FF, FM, FFS, FFSS, FFSSS, FFDS;
(*d*) FFF, FFM, FFFS, FFFSS, FFFSSS, FFFDS;
(*e*) MF, MFS, MFSS, MFSSS, MFDS."

Classes II and III of Rule 1 and the other Rules, are the same as in the Mitakshara school.

[2] The following rules are proposed for the whole of India:—

"*Rule* 1. When a Hindu dies intestate in respect of heritable property, it shall devolve in the following order on the following classes of relations, namely,

I. The "enumerated heirs", that is to say.

(*a*) *The intestate's widow and descendants*;

bhaga schools. The suggestions made in regard to the proposals concerning the Mitakshara law, such as the award of the larger share to the son, the promulgation of a rule that ordinarily two-co-heirs if of opposite sexes should share the inheritance in the ratio of 2 : 1 male to female, the inclusion of the destitute widowed daughter within the circle of heirs taking by simultaneous succession, the starting of the operation of Rule 8 only after the enumerated heirs are exhausted, the enlargement of the circle of enumerated heirs by admission thereto of the son's daughter's son, daughter's son's son, daughter's daughter's son etc., the abolition of the share allotted to illegitimate sons among Sudras, the definition of the position of the adopted son and the anulomaja son, the clarification of the position of disqualified heirs, the enunciation of the rules of exclusion from succession etc., will *mutatis mutandis* hold good in regard to the proposals for All India. The inclusion of the maternal grandfather and his descendants among the enumerated heirs is a move in the right direction particularly in

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(1) Widow (2) Son (3) Son of predeceased son (4) Son of predeceased son of predeceased son. (5) Unmarried daughter	(all succeeding simultaneously and with equal rights).

(6) Married daughter.
(7) Daughter's son.
(8) Son's daughter.
(9) Daughter's daughter.
(*b*) *The intestate's father and his descendants*:
(1) F (2) FS (3) FSS (4) FSSS (5) FD (6) FDS.
(*c*) *The intestate's father's father and his descendants*:
(1) FF (2) FFS (3) FFSS (4) FFSSS (5) FFDS.
(*d*) *The intestate's father's father's father and his descendants*:
(1) FFF (2) FFFS (3) FFFSS (4) FFFSSS (5) FFFDS.
(*e*) *The intestate's mother's father and his descendants*:
(1) MF (2) MFS (3) MFSS (4) MFSSS (5) MFDS.

[SD and DD are the intestate's own descendants and therefore belong logically to I (a).

It is unnecessary to mention the son's widow or the grandson's widow or the great grandson's widow, or M or FM or FFM separately, because by virtue of Rule 8, if widows, when succession opens they take the place of their respective husbands]

II. *Agnates of the deceased* (*i e.*, persons related to him wholly through males) other than those already enumerated under I.

III. *Cognates of the deceased* (*i.e.*, persons related to him, but not wholly through males) other than those already enumerated under I.

Explanation:—A woman who is related to the deceased wholly through males, (excluding herself) is an agnate and any other female relation a cognate for the purposes of these Rules."

Rules 2 to 8 are the same as the Rules 2 to 8 proposed in the case of succession in the Mitakshara school,

view of the intimate attachment that in actual life one often finds subsisting between a person and the members of his maternal grandfather's family. Even if this group of persons had been placed immediately after the paternal grandfather and his descendants there may not be much objection to such a step. The enumeration as made avoids the criticism of remote sapindas and samanodakas being preferred by a strict application of the rule of blood-relationship as measured by line and degree to persons who will be nearer from the point of view of natural love and affection or spiritual benefit.

Examination of the proposed rules of stridhana succession.[1] The proposals relating to stridhana succession adopt Vignaneswara's definition of stridhana, that it conforms in its import with its etymology and is not technical. At the same time it is recognised that a distinction should be made between property inherited from a male owner and other types of stridhana for purposes of devolution. The elimination of all other distinctions for purposes of devolution, whether founded on the status of the woman or on the mode of acquisition of property or on the form in which she was married, is a most laudable step and makes the law simple and easily intelligible. The suggestion that the Rules of succession proposed in regard to the Mitakshara school may also be adopted in the Dayabhaga school is a reform very much to be desired.

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[1]The following rules are proposed for the Mitakshara jurisdictions:—

"1. If a Hindu woman dies intestate in respect of *stridhana*, it shall devolve according to the following rules.

2. That part, if any, of the *stridhana* which was inherited by her from a male owner shall devolve upon his heirs in the order in which they would have succeeded to his property.

3. Save as aforesaid, *stridhana* shall devolve upon the following relations of the intestate in the following order:—

(*a*) Unmarried daughter;
(*b*) Married daughter;
(*c*) Daughter's daughter;
(*d*) Daughter's son;
(*e*) Son;
(*f*) Son's son;
(*g*) Husband;
(*h*) husband's heirs in the order in which they would have succeeded to his property;
(*i*) Mother;
(*j*) Father;
(*k*) Father's heirs in the order in which they would have succeeded to his property;
(*l*) Mother's heirs in the order in which they would have succeeded to her *stridhana*;
(*m*) Daughter's husband."

PRISON REFORM*

BY

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III—Penological Problems.

Penological problems may be analysed as follows: (*i*) Conception of punishment. (*ii*) Punishment in special cases. (*iii*) Forms of punishment. (*iv*) Alternative punishment. (*v*) Indian penal reform.

(*i*) *Conception of punishment*:

(*a*) *Inevitability of punishment.* The idea that no offence should go unpunished has persisted from the beginning of history and still dominates criminological thought and practice. The main sources of such a conception are:—the revenge theory of punishment, political retaliation, safety of the state, vindication of the majesty of law and authority, analogy of the law of causation, theological notions of punishment expiating the sin of the offence or exorcising the influence of the devil, the need for impartiality of criminal administration, Kant's theory that the law of punishment is a categorical imperative (according to which punishment is an end in itself), the theory that punishment must be in proportion to the injury inflicted by the offence or in proportion to the gratification to the injured as redress, and the theory that certainty of punishment operates as deterrence of crime.

Of these reasons only three—safety of the state, impartiality of justice and deterrence—possess some real validity. But these reasons are not absolute and must admit of numerous exceptions and limitations. Welfare of the citizen and respect for his liberty must be as important as, if not more important than, the safety of the state. Unless the state belongs to all equally and wholly, safety of the state would amount to no more than the safety of the governing interests, very often at the expense of the majority of citizens. A modern state cannot remain a mere police state; it must civilise and educate its citizens. A strong will is especially necessary for criminals to resist crime, but severe punishment defeats itself by killing their will power. The safety of a state ultimately depends upon the efficiency and the love of liberty of its citizens and their willing co-operation. Repression will destroy all these factors. The right to pardon and to revise sentences exists in all legal systems and now requires to be systematised and extended. Considerations of impartiality of justice should in practice result in the decrease rather than the increase of prosecutions. The act of prosecution cannot but be subject to the discretion of the Executive. The Executive of any State may in practice use

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* Continued from p. 26, (1941) II M L.J. (Journal section).

this discretion ruthlessly against its opponents but be unwilling to prosecute its own partizans and supporters. A Nazi ministry will not last for one moment if it prosecutes Nazi culprits with the same thoroughness as it prosecutes others. To expect increase of Nazi prosecutions for the sake of impartiality is to expect the impossible. The only practical alternative is that impartiality should be shown in letting off non-Nazis also to the same extent as the Nazis.

Deterrence by fear of punishment is morally undesirable as already explained. Practically it is not a success. This fear has not diminished either the quantity or the quality of crime in any country. This fear can easily be overwhelmed by excitement, passion, mental defects, ideological fads, environmental necessities, suggestion etc. The doctrine of obsolescence of laws advocates that there should be no prosecution for contraventions of old laws which have become obsolete. In every age the Courts themselves declare certain laws as being obsolete. In India, Smriti texts have declared that entire codes are to be treated as obsolete in succeeding *yugas* and that *achara* can repeal a text.

(*b*) *Legal punishment*: Legal punishment is what is inflicted or allowed to be inflicted by law. Non-legal punishment is what is inflicted by religion, morality, conscience, family, caste, society, institutions (such as the schools, clubs, Trade Unions etc.,) and employers. Legal punishment is primarily physical and external. Non-legal punishment may be both mental and physical. Non-legal punishment is wider than legal punishment in its scope, extent, variety and effect. Dosteviesky's masterpiece "Crime and Punishment" illustrates that non-legal punishment is far more terrible and unbearable than legal punishment. Fear of the displeasure of the *guru* or the husband, the silent tears of a mother, the threat of disinheritance and non-protection by a father, the threat of dismissal by an employer, the threat of *dharma* and similar methods, the threat of excommunication or boycott—these inflict far more terrible punishment than the state could ever hope to do. This is one of the reasons why the power to inflict non-legal punishment on the part of ecclesiastical authorities, parents, husbands, guardians, teachers, employers, social bodies and institutions has been continuously curtailed by law. But the state itself was employing all the forms of non-legal punishment when it was using torture either for discovery or as punishment. The authorities that impose legal punishment are: (*a*) Criminal Courts (*b*) Civil Courts. The latter impose punishment, (*i*) for contempt of Court, or by way of (*ii*) disciplinary action under the Legal Practitioners Acts (unless vested in Bar Councils), or as (*iii*) civil imprisonment for debts or under S. 74, Civil Procedure

Code. (*c*) Revenue Department, awarding punishment in regard to revenue offences. (*d*) Legislative Houses awarding punishment for contempt of its authority or privileges and rules. The aim of legal punishment is four fold: (*a*) protective *i.e.*, protection of the state and the society from the activities of the criminal. (*b*) retributive *i.e.*, revenge for the injury done. (*c*) deterrent or preventive *i.e.*, to prevent the criminal from repeating the crime and the public from resorting to it, and (*d*) reformatory *i.e.*, to reform the criminal. The comparative value of these aims forms the subject matter of the several theories of punishment.

(*c*) *Theories of punishment*: There are three notable theories of punishment—the retributive, the deterrent and the reformatory theories. It may be taken that the first theory is wholly discredited now and the second is yielding place to the third. The aspiration of modern criminology is to retain the psychopathic, sociological and the retributive methods of treatment only and to abolish *in toto* the penological method of treating even real and true criminals. It is now agreed that penological treatment should be totally abolished for pseudo-criminals and nominal criminals subject to two exceptions: (*a*) their crime may be treated as a tort and the injured may be awarded compensation according to the ability of the criminal, and (*b*) detention may be enforced against nominal criminals in order to protect the community from their harmful acts. Beyond monetary compensation and detention there should be no other form of penological treatment accorded to these classes of criminals. Punishment that is now retained must be deemed to be a measure of social defence and should aim at reforming the character of the criminal. The implications and characteristics of reformatory punishment may be summed up: (*a*) Criminals are normal men and crime is a normal activity which must be treated normally; (*b*) Anti-sociality is relative to time and place and fluctuating opinion upon which none should be damned for ever or irretrievably; (*c*) Criminality is not a fixed mental trait nor a fixed objective standard, and is largely the result of heredity and environment; (*d*) Crime and punishment are purely secular matters; (*e*) It is the criminal, a personality, that should be treated and not objective crime; (*f*) Treatment must fit the criminal and not the crime; (*g*) Legal punishment is not inevitable and must be gradually eliminated altogether; (*h*) The criminal should be treated as a mental case and controlled by creating in him a sense of self-control; (*i*) Great prominence should be given to the task of reforming his environment, and (*j*) the aim of treatment should be to reform the character for the future rather than to wreak revenge for the past.

(*d*) *Punishment fitting the crime.* Originally this theory was the embodiment of the old law of retribution of an eye for an eye. In modern times Kant and Bentham have given it a new orientation. Kant advocated the theory of equality of suffering. He held that punishment is a categorical imperative, an end in itself, and must correspond in quantity to the suffering of the injured. The pain of the punishment must equal the pain of the injury. Hence punishment must fit the crime. For murder death is the only punishment. This theory is however quite untenable. It is theological in its implications rather than secular. It perpetuates the savage law of retribution. It seeks to save capital and corporal punishment against the enlightened opinion of the world. Further the standard for measuring suffering or punishment is not determinable. The suffering in body and mind cannot be measured. The suffering in reputation can neither be measured nor visited upon the culprit in the same measure. The pain of suffering in property is also incalculable. The loss of Rs. 100 to one man may mean much more than the loss of Rs. 1,000 to another. The proportion varies almost to infinity. Are we to attach a staff of economic and statistical experts to Courts to assist in determining this scale of proportion? They can work upon materials which another army of officers have gathered after an exhaustive study of the life conditions of both parties. This task may take months if not years. Till then no punishment can be inflicted. If the culprit is poorer than the victim proportionate punishment cannot be imposed upon him. The general consequences of a crime may involve incalculable damage. The swindles of a financier may ruin millions and cause greater suffering than dozens of murders. But Kant dare not prescribe death to the financier. If moral guilt of the offender rather than the damage done to the body, mind, reputation and property of the injured is the criterion of measuring the suffering that a crime must produce, the quantum would become arbitrary and speculative, further, even a wish or an attempt at crime would involve moral guilt and will have to be punished. Kant's theory is also unworkable in practice: (*i*) Murder and death penalty can never resemble each other. The circumstances of murder vary infinitely and cannot correspond to those under which the murderer is executed. (*ii*) Imprisonment does not correspond to any crime. A period of imprisonment bears no likeness to theft or forgery. (*iii*) Transportation also does not correspond to any offence in suffering. So is fine imposed for technical offences. (*iv*) Even for the same offence in no penal system is the same punishment imposed for juveniles, habituals, aged men, or first offenders. (*v*) Suffering by imprisonment varies according to the status, condition and

temperament of the prisoner. A high class man suffers more than a low class offender, and a first offender more than a habitual. (*vi*) No law can codify a table of scales of punishment and must leave the quantum to judicial discretion. (*vii*) Greater punishment is now inflicted on certain classes of offences like those against the state or against property. Habituals for the same offence receive greater punishment.

Bentham advocated the theory of equality of gratification: "Inflict the proper punishment and let the injured party derive from it such a degree of satisfaction as comports with his situation and of which his nature is susceptible". But punishment can never be in proportion to gratification to the injured. This theory is even more untenable than that of Kant. To encourage the injured to view punishment as gratification will produce moral depravity.

(*e*) *Revision of sentences*: Revision of sentences is opposed by many on several grounds: on the theory of revenge, on the theory of punishment fitting to crime, on the score that the majesty of law and judicial administration should not become impaired, that revision leads to jobbery, back-door influences, partiality and corruption, that political influences may operate and render criminal justice a farce, that if the convict hopes for and expects a revision, punishment would cease to operate upon him as a deterrent or reformatory process and would upset all sense of discipline, that the rich and powerful and influential criminals would monopolise all the advantages of the privilege of revision, and that when legal experts like Judges aided by lawyers have determined a sentence revision by a less expert body on the basis of the same material but without the aid of a discussion or representation by lawyers is not going to achieve anything better.

But revision has to be adopted for various reasons: (1) considerations of revenge or prestige should not stand in the way of revision; (2) the liberty of a citizen being at stake the justification for its loss requires continuous examination; (3) instead of sacrificing revision it should be organised like the judiciary to proceed with independence and impartiality, (4) the examination of the sentences by another body freed from the rigidity of judicial procedure and the cramping atmosphere of the Courts and the pedantry of lawyers would involve a different outlook and would prove socially beneficial; (5) convictions based upon a technical interpretation of law or fact, upon undetected imperfections in the legal code, upon legal pedantries and sophistries divorced from life, upon obsolete fictions and precedents, and upon grounds of a controversial nature do require immediate revision; (6) often convictions may have been unconsciously influenced

by political or religious bias and if counteracting political and religious influences affect their revision the result would not be harmful; (7) apart from these considerations the need for revision requires to be examined from time to time in the light of changing circumstances; (8) all Governments have retained the power of releasing prisoners or remitting sentences and hence it is desirable to have this function scientifically organised, and (9) hope or expectation of revision cannot demoralise discipline. Such hope is a legitimate right and cannot be dubbed as an evil factor. All convicts cannot come to entertain such hopes except those who feel they were unjustly convicted and who are sure of friendly help. Denial of hope in either case would be a demoralising factor. A prisoner who hopes for a release would not risk it by bad behaviour. Hope of remission is perhaps the best promoter of discipline of the best type.

Revision to be effective must be systematic and universal. It must be applied to all classes of sentences. Revision Boards must sit continuously and permanently. The Boards attached to jails would be Remission Boards and not Revision Boards. A Revision Board consisting of not less than 3 and not more than 5 persons the majority of whom are lawyers of not less than 10 years' practice elected periodically by the local law associations may be attached to each of the criminal Courts in the State. The Courts must send a calendar return of their cases after final disposal to these Boards. To enable the Boards to revise sentences such as fines, whipping, very short term imprisonment etc., which will be executed without delay, it may be provided that the Boards should have power to request Courts to stay the execution of the sentences upon the application of parties and the Courts also should upon the application of the parties do so and grant time for parties to move the Boards to request for stay. Service on the Boards must be purely honorary. For the present the opinion of the Boards may be made recommendatory, the Government alone revising the sentences; but so long as capital sentence is retained, the recommendation of the Board attached to the High Court for transmutation of such a sentence must be accepted by the Government and carried out. The Revision Board must be able to consult any body of experts on any matter it considers necessary.

It is extremely desirable that non-official agencies or specialist bodies like Bar Councils, Law Associations, Medical Bodies, Criminological Institutes, Psychological Institutes, Medical and Psychological Faculties of the University, Prisoners Aid Societies, philanthropic bodies, *etc.*, should interest themselves and try to assist the Revision Boards.

In many countries the Probation Officers or other bodies dealing with juvenile criminals have the right to request the juvenile Courts to modify the sentences. That may be adopted here also even for adults.

(*f*) *Aid and after-care*: Owing to the abnormal atmosphere surrounding everything relating to criminals and the nature of the punishment inflicted upon them the majority of them become wrecked morally and economically and cannot stand on their own legs without organised and effective aid.

In advanced countries numerous types of well organised Prisoners Aid Societies have come into being. It would be extremely desirable that these should be largely honorary and non-official but the Government cannot neglect to enter the field especially in a country like India. Government on its part should try to remove every sort of restriction imposed upon convicted persons on old fashioned ideas. I would advocate a system of doles to all helpless persons. Government must liberally help Aid Societies with funds. Part at least of the prisoners' gratuities and earnings should be utilised for this purpose. If any scheme of national insurance or old age pension is created, convicted persons should not labour under any disability. The Aid organisations must cater to the juveniles, women, the aged, the disabled (physically or mentally) and the labouring classes by different methods through different sectional or independent organisations. All these organisations should be amalgamated into a national organisation with a central body at the top to co-ordinate the work. Learned bodies like Criminological Institutes or University bodies must render help and advise these Aid Societies.

In several countries the Governments have created official guardians, Parol Officers, Probation Officers, Public Assistance Authorities etc., to take care of juveniles or insane persons. Such organisations require to be extended to other classes of convicts also.

(*ii*) *Punishment in special cases.*

(*A*) *Juveniles and adolescents*: Special treatment for juvenile and adolescent delinquents has been elaborately developed during the last 30 years in all progressive countries. Special laws, special Courts, special buildings, special institutions and special administrative organisations have been built up in most of the countries. Most countries have special Children Acts. England had a Children Act in 1908 and has now a Children and Young Persons Act in 1933. Recently in 1937 France passed a Children's Code by codifying all laws, decrees, circulars, regulations and rules regarding children.

Minors are now divided into children and adolescents. Minors under 14 are children except in India (12 years), France (13), Sweden (15), and Chile (16). The next class is often subdivided and called differently. It is called minors in Germany, India, Japan, Sweden etc. England calls these "young persons." India divides them into youthful offenders (12 to 15) and young adult offenders (15 to 18). The Irish Free State divides them into "young persons" (14 to 16) and "young offenders" (16 to 21).

Law also prescribes ages for non-culpability and for conditional culpability. The age for absolute non-culpability ranges from 7 (S. Africa, U.S.A., India etc.) to 16 (Chile) under which age no child will be culpable for any crime. England has 8, France 13, Ireland, Italy and Japan 14 and Sweden 15. The age for conditional culpability ranges from 7 (S. Africa etc.) to 20 (Chile). During this age the child will be culpable on condition that real criminal responsibility is proved. India holds in the case of children from 7 to 10 that they commit no crime if they are not mature enough to understand. The U.S.A. holds that children under 7 to 14 are presumed to be *prima facie* incapable of crime while children under 14 to 18 are presumed to be *prima facie* capable of crime. South Africa also presumes children under 7 to 14 to be incapable of crime.

Most of the countries have now special juvenile Courts which work under special procedures. These Courts are more concerned with the investigation into the motives and conditions that caused a juvenile to commit the crime as well as with the modes of providing for reformatory treatment than with the proof of his crime and its punishment. In my opinion women should be preferred to men as Judges of these Courts. Certain institutions and officers technically called Auxiliary Services of the Juvenile Courts assist these Courts in investigation, medical and mental examination, supervision, detention, and probation. They investigate the mental and environmental conditions of the juvenile delinquent as well as the circumstances under which the crime was committed, and guide the Juvenile Court in deciding about the treatment to be accorded to him.

According to modern view juvenile and adolescent delinquents should not be punished or sent to prisons but should be placed in special Reformatory Institutions. Mexico has abolished prisons for minors. Some countries send them to prisons only in the last resort. Some countries have reformatory prisons as distinguished from reformatory schools (*e.g.*, Victoria in Australia). The names of a few of these characteristic Institutions may be mentioned:

(*a*) Reformatories:—(i) Reformatory schools, (ii) Reformatory prisons (Victoria), (iii) Reformatory colonies (Estonia), (*b*) Industrial Schools (U.S.A.), (*c*) Farm houses (N.S. Wales), (*d*) Central prison for minors (Greece), (*e*) Medical Establishments (Mexico), (*f*) Moral Assistance Institutions (Italy), (*g*) Homes and Hostels, (*h*) Guardians, (*i*) Borstals (England), (*j*) Institutions for abnormals, (*k*) Public Assistance Authorities, (*l*) Charitable Institutions, and (*m*) Probation Officers. As a rule separate institutions exist for boys and girls. In some institutions they remain mixed up to a certain stage. Vocational and moral education receive great prominence.

The second International Child Welfare Congress at Brussels in 1921 recommended, (*a*) prolonged psychic observation of juveniles to discover their undetected abnormalities and anomalies, and (*b*) provision of graduated regimes for educating children from social perversity to amenability.

According to the International Penitentiary Congress held at Washington in 1910 the duties of Probation Officers are:—(*a*) Detailed investigation about juvenile offenders and submission of the results to Juvenile Courts before decision. (*b*) Escorting juveniles to the Reformatory Institutions to which they are sent by the Court. (*c*) Acting as guardian *ad litem* in adoption cases. (*d*) Undertaking the supervision of a child who may be placed by the Court on probation. The Probation Officers may be (*a*) Public Officers paid by Government (*e.g.* England), (*b*) Paid Officers to whom are attached unpaid volunteers or members of child welfare organisations (Spain Portugal, Bengal, Victoria, etc.), (*c*) Non-officials who co-operate (*e.g.*, France, Belgium, Poland). These officers are appointed by the Juvenile Court (Belgium, Poland, Spain) or by the Government (London, Bengal, S. Africa, etc.), or by the Probation Committee (England except London).

(*B*) *Civil Prisoners*: While in many countries imprisonment for debts is being abolished India is still reluctant to give it up. Its abolition will stop the alleged exploitation of the poor. It will also be a great public gain as it will reduce prison establishment and save the time of civil Courts. It may be true that civil imprisonment enables the realisation of decree debts to some extent. But this result may increase tenfold if the debtor is allowed to be beaten or tortured. Penal coercion should however be confined to crime only. According to the new outlook it is to be abolished even for crime. Indebtedness is not a crime, and it would be the height of barbarity to apply in this age penal coercion to debtors.

(*C*) *First Offenders*: Barring one or two in a thousand the first offence would be an accidental or chance offence. If the

offenders are barbarously punished and sent to prisons a large number of them are sure to develop into recidivists and habituals. This has led many countries to let them off on probation or to punish very leniently and to keep them separate from the habituals. This leniency is opposed to all the old theories of criminology and can only be justified by its new ideas. According to the theory of free-will the first offender will have to be punished more than the habitual since the will of the first offender is freer to resist crime than the will of the habitual which is dominated by criminality hardening into a habit. According to Kant's theory of equality of suffering, the first offender must not suffer more than the habitual and the latter cannot be punished more than the former. According to the retributive theory punishment for both cannot vary. S. 562, Cr. P. Code, must be extended practically to all offences and to all persons. The system of demanding security must be abolished as it serves no useful purpose and destroys the man's self-respect.

(*D*) *Recidivism of habituals*: Recidivists are usually classed as Intermediates and Habituals. There are no natural or universal tests to differentiate the two. The distinction based upon the number of previous convictions is an artificial and arbitrary test. The Prevention of Crimes Act of 1908 in England ruled that if a person with a number of previous convictions comes before the Court for a fresh offence, say housebreaking, and if the Judge holds him to be a habitual he shall sentence him to penal servitude for the fresh offence and also to five to ten years of preventive detention after completing the former sentence. A new preventive detention prison has been built where these are detained for a number of years without the full rigours of the prison discipline. The object of this is merely protective—to protect society from their depredations. A wild suggestion has sometimes been made that incorrigibles should be marooned in some Pacific islands and left to shift for themselves. But modern psychology and the New Education Science refuse to admit that any person can be held to be incorrigible or incapable of reform. A habitual cannot be legally defined at all. It depends upon mere practical impressions and ethico-theological notions. It is often said that a person whose character has become perverted, who is lost to all sense of shame, who has no sense of horror for crime or vice and whose tendency ever runs towards crime must be a habitual or an incorrigible criminal. This is merely the echo of the old theory of moral insanity with a vengeance. This theory of moral insanity dates from the 17th century. A human personality is conceived to consist of intellect, will and emotions. Morality is moral sentiment and is based on man's emotional nature only according to Locke

and the philosophers of the 17th century. Character is moral sense—moral emotional nature. Insanity implies the disorder of the human personality as a whole—of will, intellect and emotion. Moral insanity implies degeneration or disorder of character, of moral sense, of emotional nature only without the impairing of the intellect and the will. A morally insane person possesses intellect to understand what he does and will to restrain his action but is devoid of moral sentiments and his anti-social acts would be remorseless. Remorselessness is held to be the test of such moral insanity. As the will and intellect remain unimpaired the person is quite sane for purposes of punishment. Such a morally insane person would be a habitual and incorrigible criminal. The Italian School of Criminology blessed this theory by suggesting a cause for moral insanity, namely, atavism. This theory of moral insanity is fallacious. The division of mind into three water-tight compartments as will, intellect and emotion is untenable. They are merely inter-dependent aspects or modes of mental manifestation. If the intellect or emotion is affected it only means the mind as a whole is affected and all its three aspects will be equally affected. This theory ignores the workings of the unconscious mind on the conduct of man. If degeneracy produces moral insanity, intellect and will also must degenerate. A moral imbecile with a sound intellect and a strong will cannot be found. Criminality proceeds not from want of moral sense but from ignorance, weakness of will, bad social environment, excitement of passion, etc. Character is psychological rather than ethical. A man of character is one who displays strength of mind in his action whose ethicality depends upon the character of his motive as well as the character of the effects of his actions upon others. Ethicality is thus not psychological and is extraneous to mind. There is no fixed moral sense or moral faculty in the mind of men. Morality is a matter of ideas and opinions which vary from age to age and country to country. Emotions as such whether primary or derivative are neither moral nor immoral. Love, anger, greed, fear, etc., may prove good or bad according to circumstances. During a patriotic war hatred of the enemy is not condemned as immoral. The psychic bent of man at birth is a moral. It develops under stress of the social environment and becomes habitually pro-social and not anti-social. Its moral character would thus be ethical. It is only under stress of adverse circumstance, or temporary moods and conditions that it would get defeated for limited periods or on isolated occasions. Immorality would thus be abnormal. What has been described as moral insanity by past thinkers is now recognised to be merely some form of mental defect and no more. Lombroso called it a form of latent or attenuated

epilepsy. Parmelee calls it a kind of lunacy or a form of congenital imbecility.

It is thus clear that the so-called Habitual or Incorrigible criminal is very largely mythical like the Economic Man. If he exists at all he is a kind of lunatic or a feeble-minded person. Medical treatment rather than punishment should be provided for him.

(iii) Forms of Punishment.

These may be classified as follows: (*A*) *Insult and Humiliation*: (1) Reprimand, (2) Public Disgrace (*e.g.*, mounting on an ass—Manu VIII. 370) and (3) Branding or face mutilation, etc.

(*B*) *Economic punishment*: (1) Fines, and (2) Forfeiture of property.

(*C*) *Banishment*: (1) Externment from one place to another in the same country, (2) Exile to a desert frontier (Ancient Egypt) (3) Deportation to other countries, (4) Transportation to penal colonies, and (5) Marooning.

(*D*) *Deprivation of civil rights*: (1) Enslavement of the person and his family, (2) Loss of citizenship, (3) Loss of franchise, (4) Loss of profession, (5) Loss of parental rights over children, (6) Loss of free life (*e.g.*, Parol life), and (7) Degradation.

(*E*) *Death*: (1) Modern—some thirty methods of execution, and (2) Ancient—countless methods.

(*F*) *Corporal punishment*: (1) Whipping (by means of cane, rod, cat, birch, bastinado, scourge, etc.), (2) Mutilation, (3) Torture, (4) Penal diet.

(*G*) *Imprisonment*.

Insult and humiliation: Insult as a punishment is primitive, inhuman and inefficacious. All its existing forms may be safely abolished.

Economic punishment: This is really the punishment of the criminal's family. The rich will easily escape and the poor will suffer disproportionately. It would be vindictive in the case of politicals. The levy of fine must be by civil process only. No fine should be collected if the man has suffered imprisonment for it.

Banishment: Transportation to penal colonies is not possible in the face of the growing self-consciousness of those colonies. Public opinion is now condemning this burying alive of these unfortunates. Deportation to foreign countries is now felt to be dangerous as it would enable the deportees to plot from abroad.

Loss of civil rights: Public opinion is coming to condemn deprivation of civil rights. This punishment is akin to enslavement. If the modern world cannot punish by means of slavery and social degradation how can it punish by means of political degradation? It is monstrous to justify the deprival of citizenship, franchise, profession, or free movement on the ground that crime indicates or causes moral degradation. When a convicted person can marry and procreate, own and transfer property, do business, give evidence, attend church or temple, talk or lecture, control and guide his party, write books or articles, how on earth can we say that he is unfit to vote or to practise a learned profession? Even criminal law abhors the view "once a criminal always a criminal". But in the civil sphere it is honoured by holding that a convict if allowed to vote or to practice a profession would cheat and act criminally. This punishment is vindictiveness *par excellence*. Loss of profession is punishment of the family for no fault of theirs and the deprivation of the valuable skill and talent of the convicted person to the community. Loss of parental rights unless necessary for the welfare of the children would be the most inhuman punishment. A life on parole subjects the man to petty police tyrannies and intolerable troubles which has forced many to seek the shelter of prisons.

Death penalty, etc.: Death sentence is a savage survival which modern opinion wants to root out. Modern world has practically given up mutilation and torture. Some still believe in whipping but even they do not defend the cat or the leather whip. Corporal punishment is condemned by the New Discipline system and cannot be retained as before.

Imprisonment: This has now become the residuary punishment.

(*iv*) *Alternative punishments.*

Even if penological treatment should be retained for the true criminal class, modern thought demands a wholesale transformation of the old forms of punishment. Imprisonment has now become a residuary punishment and in the interests of economy and the reformatory ideal certain alternative punishments have been suggested such as the following:—

(*a*) *A—Sexualisation* has been advocated for incorrigibles, sex offenders, congenital criminals, those who are suffering from heritable diseases, etc. The treatment is barbarous and unjustifiable except in the case of the eugenically unfit. This may be beneficial to the race but cannot act as a punishment to any individual.

(*b*) *House detention* is where a person is asked to remain at his own house and is prevented from going out. It is the cheapest form of confinement. It has at least two defects: (1) It may prevent the man from taking any exercise and destroy his health. (2) It may cause hardship to a poor man who is not possessed of sufficient means to feed himself without earning. In jails his food is freely supplied to him. The Government of India pays allowances to all the detenues.

(*c*) *Compensation as in tort according to capacity* has been suggested by way of (1) fines on the rich to compensate the injured, and (2) compensatory labour enforced on the poor who cannot be fined. They should be made to work for the injured and make good the injury.

(*d*) *Extension of fines on the rich according to capacity* has been mooted (1) for awarding compensation to the injured, (2) for meeting the expenses of criminal administration, (3) for creating a compensation fund to compensate the poor accused who are prosecuted and acquitted and (4) for helping the released prisoners.

(*e*) *Indeterminate sentence* is intended to convert imprisonment into a reformatory process. If the prisoner understands that he can get himself released at any time by his good conduct he will strive to reform himself. This should only be applied to the so-called Incorrigibles and Habituals. To apply it to first offenders, chance criminals or juveniles will be a clear misuse of power. In the case of Politicals it is liable to be abused.

(*f*) *Penal commune* like industrial or agricultural self-governing colony for long term prisoners is also advocated. Russia is trying the system extensively. An executive committee elected by the colonists rule the colony. A factory or a farm will be run on scientific lines. The colony will be like a tiny republic. Its members can inter-marry or even get their children or spouses to live with them. They will possess all the equipment of a town. They cannot leave the colony except by permission. If they want to leave the colony they will have to serve their unexpired term of imprisonment in the ordinary prison. After serving their full term in the colony they may be permitted to remain further also. The English Penal Detention camps are also run on somewhat similar lines.

(*g*) *Recruitment to military service*: During war times prisoners have been everywhere employed for military work of all kinds. The same may be done in peace times also. The fit and capable may stick on to military service and its rigid discipline as well as the securing of an employment would certainly cure criminality.

(*h*) *Judicial reprimand*: In the case of first offenders, chance criminals, educated and sensitive criminals a finding of conviction and a warning would often be quite sufficient. The publicity, disgrace, expense, discomfort and anxiety of the trial and conviction are sufficient to deter such persons from relapsing into crime. Several modern codes have adopted it.

(*i*) *Suspension of sentence*: (1) U.S.A.—On promise of good conduct in future no conviction or sentence is passed. (2) England —On conviction the person may be released on probation by taking surety, etc., (S. 562, Criminal Procedure Code, embodies this). (3) Belgium—Conviction and sentence are passed but on promise of good life for a fixed period the sentence will be suspended. If the person commits another crime during such period of probation he will have to undergo the sentences for both the crimes.

(*v*) *Indian penal reform.*

There should be extensive amendments both in the Indian Penal Code and the Criminal Procedure Code.

(*A*) *I. P. C. amendments*: It is impossible to review the Indian Penal Code exhaustively. A few stray suggestions may be made:

(1) Further consolidation of all penal laws within the code.

(2) Omission of certain civil and moral wrongs from the code, *e.g.*, (*a*) Ch. 10, Ss. 182, 185; (*b*) Ch. 11, Ss. 191 to 210; (*c*) Acts of negligence; (*d*) Ch. 16, S. 312 to 314, 317-18; (*e*) Ch. 17, Ss. 415 to 424; (*f*) Ch. 18, Ss. 463-489; (*g*) Ch. 19; (*h*) Ch. 23, S. 511.

(3) Punishments must be revised, *e.g.*, (*a*) abolition of death, transportation, penal servitude and absolute forfeiture of property, and solitary confinement; (*b*) fine must be stipulated to be levied according to the capacity of the offender on proof of the same; (*c*) S. 75—enhanced punishments should be abolished; (*d*) reduction of all the punishments in the code roughly to one-fourth of their present prescription; and (*e*) making fine alternative to imprisonment and not to levy it in addition to imprisonment.

(4) Prescribing a limitation for prosecution.

(5) *Psychological approach*: (*a*) S. 52—The definition of good faith found in the General Clauses Act should be substituted in order to avoid the penalising of negligence. (*b*) There must be limitations of the theory of intention. In the case of the Indian Penal Code, "its authors have throughout been much imbued with the theory that neither the motive nor the result but the intention of the act ought to be the measure of its criminality" (Sir J. Stephen). Greater emphasis on motive is necessary. (*c*)

S. 84 embodies the theory of moral insanity accepted by Courts (*vide* 23 Cal. 604; 29 C.L.J. 209; 53 I.C. 828; 49 M.L.J. 528, etc.). This should be altered. (*d*) Right of private defence should be altered as in the German Code which states that "exceeding the limits of self-defence is not punishable if the perpetrator has so acted through confusion, fear or panic."

(6) Offences against the state: Here also there must be a radical revision:—(*a*) S. 121-A should be omitted as conspiracy is a form of abetment only. (*b*) Ss. 120 to 130—These should not be considered as offences unless use of violence or incitement to violence forms an ingredient. (*c*) Ss. 123-124, 127, 129, 130 should be omitted. (*d*) S. 121—Forfeiture of property should be limited. (*e*) S. 124-A should be amended on the lines of the resolution passed by the Mysore Lawyers Conference at Mandya:—(*i*) Libel on the personnel of the Government should not be treated as sedition. (*ii*) Justification and truth and good faith should be accepted as a complete defence for attacks on the Government. (*iii*) Advocacy of independence or change in the form or system of government established by law should not be treated as sedition. (*iv*) No act, intention or result shall be deemed to be seditious unless there is an express act of violence committed by the accused.

(*B*) *Cr. P. C. amendments*:—The suggestions under this head are: (1) Adoption of a scientific classification of crimes and prescribing suitable procedure for each class. (2) The use of Ss. 106 to 108 and 144 for political purposes and against political opponents must be curtailed by express amendment. (3) Restricting the power of firing on crowds. (4) Abolition of the Jury and Assessor system in all classes of cases but making jury trial compulsory in political cases in all Courts. (5) The rule to plead guilty or not guilty may be abolished and the prosecution be always made to prove its case. (6) Crown defence may be extended to all cases whenever demanded by the accused. (7) Provision for the study of the accused's character, motives and environment. (8) All offences against property and person to be made compoundable. (9) Compounding between the accused and the injured should be made binding on the prosecution and the Courts unless it is found to be fraudulent. (10) Bail to be extended practically to all offences. (11) The committal enquiry to be curtailed or abolished. (12) The accused should be seated and treated decently in Court and express provision must be made for the same. (13) The accused may be allowed to examine himself provided his evidence will not be used against him.

(To be continued).

THE

MADRAS LAW JOURNAL

II] OCTOBER [1941

NEED FOR AMENDING R. 12-B OF THE HIGH COURT APPELLATE SIDE RULES.

Rule 12-B of the Rules of the High Court in its appellate jurisdiction states:

"The time prescribed under these rules for the doing of any act shall be extended only on application made by a stamped petition and the Registrar shall, whenever he considers it necessary, be at liberty to call for the production of a certificate showing the dates on which the acts prescribed by the rules were done or should have been done, which certificate will be granted by the Deputy Registrar upon payment of a fee of Rs. 2 in Court-fee stamps".

In so far as the rule requires the payment of a fee of Rs. 2 for the certificate the provision seems to be of doubtful validity and the production of a certificate which is now almost invariably required seems to be altogether superfluous and unnecessary in many cases.

The Rules of the High Court in its appellate jurisdiction are issued under the powers vested in the High Court by the Government of India Act, the Letters Patent, the Code of Civil Procedure and the Court-Fees Act. They depend for their validity on their being in accordance with the provisions of the statutes by which the rule-making power is created both with reference to their substance as well as with reference to their sanction[1]. Under S. 223 of the Government of India Act, 1935, the High Court's power to make rules of Court shall be the same as immediately before the 1st April, 1937, namely, the power it had under S. 108 of the Government of India Act (5 and 6 Geo. V, c. 61). The rules contemplated by that section were with reference to the exercise by one or more judges or by division Courts constituted by two or more judges of the original and appellate jurisdiction vested in the Court. Cl. 37 of the Letters Patent issued on the 28th December, 1865 empowers

1. Craies, Statute Law, Third Edn., p. 259.

the High Court "to make rules and orders for the purpose of *regulating* all proceedings in civil cases" and the High Court was to be guided "in making such rules and orders *as far as possible* by the provisions of the Code of Civil Procedure". S. 122 of the latter Code confers power on the High Courts to "make rules *regulating* their own procedure", and by such rules to annul, alter or add to all or any of the rules in the First Schedule. S. 128 provides that such rules shall not be inconsistent with the body of the Code, but subject thereto may provide for any matter relating to the procedure of Civil Courts. S. 20 of the Court-Fees Act gives power to the High Court to make rules as to processes and the fees and costs chargeable in connection therewith. Broadly speaking, the rule-making power of the High Court is to be exercised under these enactments for (*i*) regulating procedure and (*ii*) prescribing fees for processes.

It is doubtful whether a power to "regulate" will include a power to levy a fee. "Regulate" according to the Oxford Dictionary signifies "to control by rule, subject to restrictions, moderate, adapt to requirements." As has been authoritatively pointed out in another context for another purpose, "it does not seem possible to stretch this meaning to include levying fees."[1] Unless the power had been expressly granted, the power to regulate will not include the power to impose a fee. As already remarked the only power conferred by the Court-Fees Act to prescribe fees by rules is as regards processes only. The imposition of a fee of Rs. 2 therefore for a certificate under rule 12-B of the appellate side rules does not seem to be within the rule-making power given to the High Court by the Government of India Act, the Letters Patent, the Civil Procedure Code and the Court-Fees Act, and seems to be unwarranted.

The Registrar's certificate is for the purpose of indicating the dates on which the several acts prescribed by the rules were done or ought to have been done in connection with the applications referred to in the rules. If an affidavit containing these dates is filed along with the petition seeking an extension of time to do the acts prescribed, surely it will be an unreasonable exercise of the discretion granted to the Registrar under r. 12-B to insist even in such a case on the production of a certificate. In this connection it is pertinent to draw attention to P. Dis. No. 840 of 1932 prescribing the duties to be performed by the Registrar, the Deputy Registrar and the Assistant Registrar, in regard to matters concerning payment of printing charges, pointing out portions for printing, lodgment and batta, and batta other than the initial batta,

1. *M. S. Aiyar & Co.*, v. *Srinivasalu Naidu*, (1941) 2 M.L.J. 145, 147.

It is absolutely essential that the directions should be construed by the Office not as taking away the discretion vested in the Officer under r. 12-B, but merely as allocating the work among the different officers for the purposes specified. Thus for instance in regard to printing charges, under P. Dis. No. 840 of 1932 the Deputy Registrar has to ask for a certificate before an application for extension of time to pay printing charges can be ordered. This cannot by any means take away the discretion to call for such certificate vested in the Officer by r. 12-B. To hold otherwise will be unreasonable. The amount of printing charges, the dates on which they were called for, and the dates when they should be paid, all appear on the Bills issued by the Office and if necessary can find corroboration from the affidavit filed in support of the application. In any event, it may be sufficient to insist that the bill itself be filed along with the affidavit. Where then is the necessity in such a case for the production of a certificate at a cost of Rs. 2? The position is equally true regarding applications for extension of time to point out portions or in respect of lodgment and batta.

In this connection r. 79 of the Appellate Side Rules may also be considered. Sub-r. 2 states that a Registrar's certificate shall be produced where an application for extension of time for the preparation of the record is filed in the manner prescribed by O. 41-A, r. 3 (2) of the Civil Procedure Code. According to r. 73 of the Appellate Side Rules the record includes both pleadings and documents. Extension of time for preparing the record may be necessary due to either or both the above not being printed or printing not having been applied for. Be the cause what it may, there is no reason why separate applications with separate Registrar's certificates should be filed under r. 79 in regard to the different parts of the record. There seems to be no warrant for construing the rule as requiring more than a single application for extension of time in regard to the entire record for its preparation. Under r. 12 (29) the Registrar is given power to extend the time prescribed by r. 79 for a period not exceeding 10 days and by r. 12-A (2) (*i*) the Registrar is empowered to hear an application for extension of time beyond 10 days of the time prescribed by r. 79. Clearly the application contemplated by r. 12 (29) and r. 12-A (2) (*i*) is one for extension of time to pay the amounts of the estimate to prepare the record *i.e.*, to pay the pleadings and the documents bills—see r. 79 (1)—and is different from the application contemplated by r. 79 (2) which deals with extension of time to prepare the record. In the case of applications to extend time for payment of the bills there can be as

already pointed out no reason to insist upon the production of a Registrar's certificate.

If only it is remembered that the practice of obtaining a Registrar's certificate originated some decades back when judges themselves dealt with all applications for extension of time, it is now but a needless relic of antiquity when the Registrars themselves are performing the function and when there is a well systematised practice of issuing bills or memos containing all particulars or of posting matters in the notice board giving full particulars sufficiently in advance.

In these circumstances it is highly necessary that r. 12-B should be either repealed or suitably amended having regard to the doubts regarding the legality of the fee prescribed by it and to the unnecessary hardship which the insistence on the production of the certificate is apt to cause in a good number of cases.

APPLICABILITY OF O. 21, Rr. 18 TO 20 TO MORTGAGE DECREES WHERE PERSONAL REMEDY IS BARRED.

BY

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O. 21, r. 20 makes the provisions contained in O. 21, rr. 18 and 19 dealing with execution in case of cross decrees and execution in case of cross claims under the same decree respectively, applicable to decrees for sale in enforcement of a mortgage or charge. The case-law on the subject is not much, but unfortunately there is a conflict of judicial opinion in our High Court as regards the scope of the rule—see *Venkata Reddi* v. *Dorasami Pillai*[1] and *Nagor Damodar Shanbhogue* v. *Gange*[2].

In *Krishnan* v. *Venkatapathi*[3], a case decided before the present O. 21, r. 20 became law, the question arose whether a simple decree for money could be set off against a decree for the recovery of money by the sale of certain lands. It was held that a decree for the recovery of money by sale of lands was essentially a decree for money, and therefore the amount due under the decree for money could be reduced. Benson and Moore, JJ., purported to rest their decision on a prior Full Bench decision of the Court in *Vaidhianadasami Aiyar* v. *Somasundram Pillai*[4].

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1. (1932) 63 M.L.J. 722: I.L.R. 56 Mad. 339.
2. (1938) 1 M.L.J. 417.
3. (1905) I.L.R. 29 Mad. 318.
4. (1904) 15 M.L.J. 126: I.L.R. 28 Mad. 473.

In the Full Bench decision, the suit was on a mortgage, in which *there was a personal remedy against the mortgagors* as also a remedy against the property. The question referred to the Full Bench was whether S. 258 (now O. 21, r. 2) Civil Procedure Code, has any application to a case like the present, so long as the remedy against the mortgaged property remains unexhausted. The substantial question involved in the case was whether the judgment-debtor could set up as a bar to the execution of a mortgage decree an adjustment of the decree between himself and the decree-holder. Hence anything in that decision with reference to a case where there was no personal remedy must necessarily be *obiter*. There is, as observed in a later decision a lot of difference between a case where the personal remedy exists, and one where it does not, in considering whether a decree is or is not one for the payment of money, that is, a money decree.

In *Nagarmal* v. *Ramchand*[1], the Allahabad High Court held that the mere fact that one of the decrees is a mortgage decree, *without any other reason*, is not enough to refuse a set off under O. 21, r. 20. Here too there was no question of a subsisting personal remedy. In another Allahabad case *Sheo Shankar* v. *Chunilal*[2], the set off was claimed against persons who were purchasers of a portion (considerable part) of the mortgaged property and who had been impleaded as such purchasers (*vide* the last two lines of the judgment). Clearly the subsequent purchasers were under no personal liability and hence a set off was refused.

The abovesaid two Allahabad decisions are important because these two along with *Burma Oil Company* v. *Ma Tin*[3] and *Venkata Reddi* v. *Dorasami Pillai*[4], will, according to Sir George Rankin in delivering the judgment of the Privy Council in a later case *Hazariram Marwari* v. *Bansidhar Dhandhania*[5], "afford assistance to the Board and to the Courts in India" (see *Hazariram Marwari* v. *Bansidhar Dhandhania*[5]). The case in *Burma Oil Company* v. *Ma Tin*[3], discusses the question directly. In that case the appellants had no personal remedy against the respondents. Heald, J., in delivering the judgment of the Bench observed: "I find it difficult to hold that a mortgage decree for the sale of the mortgaged property while there is no remedy except against the property, and where there is no obligation on the part of the mortgagors personally to pay any sum of money, is a decree for the payment of money". This view looks more reasonable, for to hold otherwise,

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1. (1910) 33 All. 240.
2. (1916) 38 All. 669.
3. (1929) I.L.R. 7 Rang. 505.
4. (1932) 63 M.L.J. 722: I.L.R. 56 Mad. 339
5. (1937) 1 M.L.J. 254: I.L.R. 16 Pat. 127 (P.C.).

would be to give the mortgagee decree-holder, (who institutes and obtains a decree after the personal remedy is barred) more than what the decree entitles him to recover, simply by reason of a decree for, say, costs in favour of the mortgagors being passed.

In *Venkata Reddi* v. *Dorasami Pillai*[1], the final decree directed a sale of the mortgaged property and provided further that *if there was any deficiency it should be paid by the plaintiff*, that is, there was a personal decree against the plaintiff because as Ramesam, J., (sitting with Pakenham Walsh, J.) observed at page 724 "by saying he is liable for the deficiency that may remain after the sale, the true character of his liability is known." Therefore the question as to whether a set off could be allowed, in cases where there was no personal remedy did not arise in that case. However, the decision is important in that it affords guidance according to Sir George Rankin in *Hazariram Marwari* v. *Bansidhar Dhandhania*[2]. The following observations in *Venkata Reddi* v. *Dorasami Pillai*[1], are worth noting. "But I will observe that even in a decree for sale it may be that the property is worth much less than the amount of the decree and the mortgagor may find it convenient to allow the property to be sold, and in such a case if he is not liable for the deficiency, *it cannot be said that there is any decree for money against him*". This decision also quotes with approval *Burma Oil Company* v. *Ma Tin*[3] referred to *supra.*

As against this, we find another decision of our High Court in *Nagor Damodar Shanbhogue* v. *Gange*[4]. This decision doubts the correctness of the principle laid down in *Venkata Reddi* v. *Dorasami Pillai*[1], but in leaving the question open, actually decides that even though one decree is executable only against the property and the other decree is personally executable, still they can be set off against each other under the provisions of O. 21, r. 19. Reliance seems to be placed on *Sankara Menon* v. *Gopala Pattar*[5] and *Hazariram Marwari* v. *Bansidhar Dhandhania*[2]. But it will be seen that in *Sankara Menon* v. *Gopala Pattar*[5] there was a decree directing the plaintiff to pay into Court or to the defendant the mortgage money, and there was also a decree in favour of the defendants in and by which the defendants should pay to the plaintiff some costs. There was thus a personal liability against both the parties by virtue of the decree of the Court. As such that decision cannot govern a case where there was no personal liability.

1. (1932) 63 M.L.J. 722: I.L.R. 56 Mad. 339.
2. (1937) 1 M.L.J 254: I.L.R. 16 Pat. 127 (P.C.)
3. (1929) I.L.R. 7 Rang. 505.
4. (1938) 1 M.L.J. 417.
5. (1899) I.L.R. 23 Mad. 121.

The decision of the Privy Council in *Hazariram Marwari* v. *Bansidhar Dhandhania*[1], is also no direct authority though that was a case where a decree for sale in enforcement of a charge was allowed to be set off against a decree for mesne profits. The observations at the end of page 259 in (1937) 1 M.L.J. 254 are quoted at page 422 (1938) 1 M.L.J., namely, "the words of r. 20 'decrees for sale in enforcement of a mortgage or charge', cannot be restricted to personal judgments such as may be given under O. 34, r. 6." But Venkataramana Rao, J., in delivering the judgment of the Bench, has not given due weight to certain other lines in the same judgment at page 260, namely, "As it was held by the judgment in the suit in which the final decree for sale was passed that the *right* of the present respondents 1 to 16 to a personal judgment subsisted and was not barred, their Lordships do not find it necessary either to examine this question afresh in these execution proceedings, or to embark upon a discussion of the difficulties that may arise if a mortgage decree be set off against a money decree in the absence of any personal liability on the part of the mortgagor who holds the money decree. Mr. Dunne for the respondents contested the view taken in the High Court as to personal liability being a condition of set off, but as this important question does not here arise for decision and calls for careful discussion, their Lordships do not think fit to pronounce upon it. In so saying they do not intend to prejudice the view taken by the High Court. On the contrary they would be slow to give effect to a rule of set off so as to alter substantive rights or to produce consequences beyond the scope of an intention to avoid circuity of proceedings. Whenever the matter arises for decision the observations of the learned Judge (Noor, J.) and his discussion of the authorities (*Nagarmal* v. *Ramchand*[2] *Sheo Shankar* v. *Chunilal*[3], *Burma Oil Co.* v. *Ma Tin*[4] also *C.F. Venkata Reddi* v. *T.V. Doraisami Pilla*[5]) will afford assistance to the Board and to the Courts in India."

Thus it will be seen that a right to a personal decree subsisted in the Privy council case, and hence it is respectfully submitted that *Nagor Damodar Shanbhogue* v. *Gange*[6] requires reconsideration, having regard to the (*a*) preponderence of authority *contra*, and (*b*) non-applicability of the very decisions relied on in *Nagor Domodar Shanbogue* v. *Gange*.[6]

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1. (1937) 1 M.L.J. 254: I.L.R. 16 Pat. 127 (P.C.).
2. (1910) 33 All. 240
3. (1916) 38 All 669.
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5. (1932) 63 M.L.J. 722: I.L.R. 56 Mad. 339.
6. (1938) 1 M.L.J. 417.

JOTTINGS AND CUTTINGS.

J. P. Benjamin.—Among the notable figures who cross the pages in Ashton's work is that remarkable man Judah Philip Benjamin who had filled the office of Attorney-General in the Confederate States but for political reasons had ere long to flee America for England, where he found a new home and where he speedily built up a huge practice. It has been said that just as some of Sir Samuel Romilly's replies were as valuable to the practitioner as were Lord Eldon's judgments in the same case, so Benjamin's arguments were equally valuable. Surely the most remarkable tribute to his greatness as a sound lawyer was that which related to an important question in which the Bank of England was the client. Sir Hardinge Gifford, Bowen and Benjamin were asked to advise the Bank. Gifford and Bowen gave it as their opinion that the Bank was right in the view it took, while Benjamin declared that the Bank was wrong. On this we are told that the Bank settled.

His Persistence.—In the year 1867 a case came before Vice-Chancellor James—*United States* v. *McRae*—in which it was sought to compel the defendant to render an account of all property which had come into his hands as agent for the Confederacy. Counsel for the plaintiff had been heard and it looked as if he was to succeed when Benjamin rose, following his leaders, and in a raucous voice began thus : " Notwithstanding the somewhat off-hand and supercilious manner in which this case has been dealt with by my learned friend Sir Roundell Palmer, and to some extent acquiesced in by my learned leader Mr. Kay, if you will only listen to me I pledge myself you will dismiss this case with costs," and that in the end the Vice-Chancellor did. That is said by one of his biographers to have been his first case in our courts.

His Humour.—When we try to call up a mental picture of Benjamin we are apt to think of him as a brusque personage with an excruciating accent and as pugnacious as the celebrated dog of which Dr. John Brown told us that its owner accounted for its preternatural gravity on the ground that "it could never get eneuch o' fechtin." Benjamin was above all things pugnacious in the interest of the client whose cause he had been briefed to support, but that he was not deficient in a grim sort of humour became apparent when, on being asked what his rule was as to fees, he replied thus : " First, I charge a retainer ; then I charge a reminder ; next I charge a refresher ; and then I charge a finisher !" This no doubt was his fun, but that he made a very large income at the English bar is undoubted. Mr. Roland Williamson in his pleasant little book on " The Law Library, in the Capitol, Washington" says that in 1880 Benjamin's income was stated to be 80,000 dollars. *L.T., 1941, pp. 23 and 24.*

THE

MADRAS LAW JOURNAL

II] NOVEMBER [1941

PRISON REFORM *

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IV. *Prisonological Problems*:—

(1) *Conception of Prisons* may be (*i*) as a place of safe custody—*e.g.*, Undertrials and Captives, (*ii*) as a place of protection, for the detention of anti-social persons in order to protect society, (*iii*) as a place of coercive assistance to creditors, and (*iv*) as a place of punishment.

Evolution of Prisons.—It is unnecessary to trace the evolution of prisons except to note that prison as a place of punishment is of quite recent origin.

General aim of Prison.—As already stated the aim of imprisonment should be wholly reformatory. A prison should be merely a place of detention to effect reform of character rather than a place to inflict repressive punishment.

Exploitation of the prison staff.—H. U. Triston, a retired warder in the English prisons in his book "Men in cages," 1938, has raised an interesting moral question which will also strengthen prison reform. He points out that all the inhuman and abnormal treatment meted out to prisoners is to be carried out by the prison staff. It is they who are compelled to flog the prisoners although it is very repugnant to their nature (p. 191). It is a nerve racking strain for them to sit and watch day and night the condemned prisoner, restless and tossing about in his bed and remorse-stricken (p. 105). It is they who have to enforce the obsolete and inhuman rules of discipline often against their conscience and sense of pity.

* Continued from p. 45, (1941) 2 M.L.J. (Journal section).

They have to do all this on account of their economic necessity. Has the State the moral right to compel the staff to do all these harmful things?

(2) *Solitary confinement and Theory of Silence.*—English and American Prison Reformers of the 18th century developed the theory of solitary confinement on various grounds. The evangelical view of crime was that crime is a sin prompted by the Devil and must be expiated by punishment with the help of religious teaching. But religious teaching fructifies in monastic life or solitary confinement. If the theory is true it must be enforced to free people also and not to the prisoner only. Secular comforts or literature like novels should be banned. The Millbank Penitentiary tried to follow this view strictly.

Howard urged solitary confinement on two grounds, namely, (*a*) to prevent the danger of contamination of indiscriminate association, and (*b*) to make the rogue think and become acquainted with himself.

Some of the English chaplains attached to jails thought that nothing but the Bible should be taught to prisoners, that learning in their hands would be dangerous and would also raise the lower classes above their proper station in society and that every prisoner should commit the Bible to memory and reflect upon his own sins. Hence solitary confinement alone would be conducive to reform in the prisoners.

Protagonists of the theory of deterrent punishment advocated solitary confinement in the view that a deterrent influence must be created by making prison conditions healthy but at the same time disagreeable by means of solitude, denial of comforts, monotonous labour, etc.

Three types of solitary confinement were developed: (a) *The pure solitary system*: According to this during imprisonment the prisoner should see no one, and even his food should be handed over through a trap in the door of his cell. (b) *The separate or penitentiary system* was the second type. In 1790 the Quakers of Pennsylvania in America started a prison called a penitentiary on the theory of absolute isolation. Prisoners were to be kept in absolute isolation in dark (under-ground) single cells without any labour being allowed to them. After an anxious examination of the several prison systems, England adopted this system on the basis of a report by one Crawford and passed a law in 1839 for introducing the separate system. A special prison was built in 1842 at Pentonville and 54 prisons were built on its model within the next 6 years. The relics of this system still persist in English prisons as well as in Indian prisons. (c) *The silent or Associated*

or Auburn System forms the last of these types. It was started at Auburn in the New York State. There were to be three stages in the imprisonment: (1) solitary confinement and no work (2) solitary confinement and work, as a mitigation, and (3) work in association (*e.g.*, road gangs, group meals, games, etc.) but in absolute silence. The prison staff could use the whip mercilessly for breach of silence. In America this system won the day over the penitentiary as it was cheaper in point of buildings and as it brought profits by associated labour. In England, Howard and Bentham advocated this.

In England, the Prison Act of 1877 reduced solitary confinement from 3 to 1 month and the Act of 1898 introduced the associated labour system. The rule regarding observance of strict silence is now modified to the extent that warders may allow prisoners at work to chat to the extent permissible to labourers at a factory. But as the warders are quite ignorant of factory conditions they go on enforcing the old rule.

The evils of the solitary and silent system are too well known. The cell system started by a Pope in 1703 is quite unfit for the 20th century. The silent dark cells have freely bred insanity. Many prisoners attend educational courses or even the hardest labour course in order to be away from the maddening cells. After deprival of liberty it is inhuman to cage the men. Solitary confinement makes man irritable, morose, gloomy and grumbling and produces moral degeneracy. "If you cage men up like animals they acquire the vices of animals" (Triston, p. 239). It is high time that the cell system is replaced by the camp system.

(3) *Classes of Prisons.*—Mysore now posssesses three classes of prisons—Lock-ups, Sub-Jails and Central Jails—based upon the term of the sentence and the size of accomodation. Within each jail all the prisoners of the locality would be housed. But the need of separation has been recognised, and within each jail arrangements have been made as far as possible to keep under-trials, civil prisoners, diseased men, simple imprisonment men and females separate from other groups.

Modern opinion does not favour even this arrangement as the segregation can never be complete except during sleeping hours. For work, exercise, recreation, meals, medical treatment, educational activities etc., the meeting together of all classes of prisoners to some extent at least is inevitable. The treatment according to modern methods fundamentally differs for each class and calls for different types of administrators, experts and staff, different kinds of equipment, different kinds of outlook. The cost of building a dozen wards in hundreds of local jails, may not exceed the cost of

building separate jails for each class for larger units of areas. There will be no economy in the cost of the technical staff but separate jails would mean more of administrative staff. This could be met by non-officialisation. At the present day, prisons are of the following categories:—

(a) *General Types.*—I. Detentional prisons, for (1) captives, (2) internees and detenues, (3) politicals, (4) civil prisoners, (5) security prisoners (6) technical prisoners and (7) undertrials.

II. Prison for juveniles and adolescents.

III. Prison for first offenders.

IV. Prison for the sickly, the aged, cripples, and lepers.

V. Prison for the feeble-minded or mental defectives.

VI. Prison for sexual offenders.

VII. Prison for the condemned.

VIII. Prison for the intermediates.

IX. Prison for habituals and incorrigibles.

X. Penal camps and colonies.

(b) *Division according to*—(*a*) sex, and (*b*) status, based on talent, character, education and social life.

The problem of separation presents infinite difficulties. Undertrials for instance are simply to be detained for safe-custody. Politicals, civil prisoners, security prisoners, captives and technical prisoners are more or less in a similar position. While economic considerations are against separation, scientific considerations are clearly opposed to it. For each of these classes may include within it juveniles, adolescents, females, cripples, habituals, sexuals, etc., who all require to be separately housed in different jails. If all undertrials are kept together habituals could most easily corrupt the first offenders during the undertrial period. Are we then to have a dozen jails for undertrials alone at each place of the Court? Wherever possible the political undertrial may be housed with the political convict, the habitual undertrial with the habitual convict and so on, provided the discipline is not disturbed. Or, can we not combine the educated politicals with the educated among civil prisoners, technical prisoners, security prisoners, sexual offenders, etc? A classification of prisoners on the basis of moral character, social status and education would yield better results for purposes of separation.

(4) *Location of Prisons.—Centralisation versus localisation.* (*a*) *Advantages of centralisation*:—

(i) Large scale economies in establishment, building cost, consumption by prisoners, and economic production of jail labour.

(ii) Better central control; absence of hampering activities of local bodies.

(iii) Possibilities of complete scientific equipment for medical, psychiatrical, sanitary examination and experiments.

(iv) Possibility of developing prison industry on business lines.

(v) Better educational arrangements.

(*b*) *Advantages of localisation.*—(i) Localisation prevents the erection of prisons as castles and fortresses with all the undesirable atmosphere surrounding them and enables the erection of homely cottage buildings which will also be cheaper.

(ii) It enables the enjoyment of country air and surroundings.

(iii) It enables the growth of regional industries in regional prisons.

(iv) A central factory demands the continuous presence of a large number of long-term prisoners. But the majority of prisoners are unskilled, short-term convicts.

(v) Modern business is also tending towards distributive regional localisation.

(vi) All social welfare institutions, schools, hospitals, reformatory jails, psychiatrical institutes, sanitary offices, etc., cannot be concentrated in one place on grounds of economy but must be developed in all regions. There cannot exist a single school or a single hospital or a single jail for the whole country.

(vii) Educational experiments also require variation.

(viii) A central jail cannot eliminate all local jails. At least lock-ups are necessary to detain undertrials near the scenes of crime and Court houses. The cost of transporting all short-term prisoners to and from a single central jail will be prohibitive.

(ix) Centralisation of jails would wholly prevent the poorer classes from visiting prisoners. England is just now adopting the device of periodically transferring prisoners to jails in their localities to enable their relatives to visit them. It is suggested that the cost of such transfer could be better paid to the poorer relatives to travel to a central jail. Both these devices are clumsy substitutes for the erection of regional prisons.

(x) Decentralisation of control to local bodies subject to strict central supervision is politically desirable.

(xi) Non-official effort and organisation are now indispensable to supplement state effort in dealing with criminals. But non-official effort and organisation should not be confined to a city or two but must become rooted in all the regions of the state.

(5) *Accommodation.*—The prison buildings must be homely cottages and there should be nothing abnormal or forbidding about them. The cell system must be abolished. Extensive accommodation must be provided for the inmates leading a camp life. Adequate privacy must be allowed for each prisoner. Storeyed buildings are condemned by many on the ground that they facilitate suicidal falls and involve larger staff. In Dartmoor a wire net has been built across the top of the first floor to break the fall of men or articles thrown and special watch is kept on the stairs.

(6) *Administrative organisation.*—I. *Central management.*—A ministry of social welfare may be created as has been done in Japan by Imperial Ordinance No. 7 of 10th January, 1938, to deal with public health, sanitation, physical education, labour welfare, child welfare, social welfare, women welfare, prevention and cure of crime and so on. A department of criminology under a Director of Criminology dealing with Criminological research, prevention of crime, penal legislation, prisons, after-care probation and so on may also be established.

A standing committee of the legislature for prisons and crimes to study, review and supervise the work of the department may also be appointed.

II. *Administration of each jail.*—A superintendent or a governor will supervise the jail. He is now a Government servant. There is considerable diversity of opinion about the desirability of recruiting superintendents from different services and positions—from military men as in England, from medical men as in India, from the police, from educationists, from industrialists, from the judiciary, from administrators or civilians. Military men are said to be best fitted for handling large masses of brutalised and savage types of men. But if the main aim of imprisonment is reform of character and not penal discipline, military men are unsuited. Criminals are different in temperament from other men and are unfit for military discipline. Military men can achieve nothing but regimentation and dragooning and uniformity and mechanical obedience. Military governors are apt to fill the jails with military men as warders, etc., and cannot superintend the work of teachers, industrial managers or medical men, whose collaboration is needed in modern prisons. Also in India such military men will not be easily available from among Indians. The same objections apply to policemen. Medical men are only specialists in a narrow field trained to study and deal with individual patients and not with masses of men and cannot as a rule possess sufficient administrative ability to preside over such institutions. Triston suggests that in order to convert jails into self-sufficient industrial

camps the appointment of industrialists would be better. But, Socialists are likely to view industrialists as slave drivers. All things considered, the educationists would be the men most suitable from this point of view. It is desirable that the superintendents and jail officers should have made a study of modern psychology, criminology and jurisprudence. To each jail must be attached a band of experts for attending to the psychiatrical, medical, industrial and educational aspects of the new treatment.

III. *Convict officers.*—The system of employing convict officers must be encouraged and extended. The minimum efficiency of a jail requires that it should have at least 30 per cent. of its staff from its own convicts. In well conducted jails it may be raised up to 80 per cent. In penal communes the convicts alone would rule.

IV. *Non-official control.*—In place of the existing Board of Visitors there should be a Board of Management attached to each jail consisting of a non-official majority and including *ex-efficio,* the Jail Superintendent as its Secretary and the President of the District Board of the District. The entire management of the jail should be vested in this Board subject to the authority of the Government and not less than 25 per cent. of its members may be ladies.

(7) *Classification of Prisoners.*—Classification is necessary for purposes of separation and allocation of prisoners into different prisons or wards and this question has been already examined.

(8) *Sanitation and Medical Comforts.*—Privacy and protection from rain and sun should be provided for in latrines. Wherever possible flush-out latrines should be installed. Windows and ventilators in jails must be increased. All the rooms must be brightly lighted. During epidemics the rooms, furniture and clothes and bedding should all be disinfected frequently. People suffering from infectious diseases should be segregated. Systematic physical education must be compulsorily provided for all prisoners. An Indian gymnasium should be opened in each jail. Swedish exercises, drill, Yogasanams, Surya namaskar and other suitable exercises must be arranged. First aid must be compulsorily taught to all.

Before the jail authorities resort to forcible feeding of a hunger-striker they must as a condition precedent intimate his friends or relatives if available or to any other public worker available immediately and allow them to intervene and persuade him to desist from it. Medical treatment by way of prevention or cure of illness should take note of the mental condition of the prisoner.

(9) *General comforts and conveniences.*—According to the old view about prisons everything connected with it—accommodation, dress, food, comforts and movement should all be penal in character. According to the new view all these things should be normal, adequate, pleasant and satisfactory. Another old prejudice against making jail life normal and pleasant is that it would put a premium on crime by providing a greater standard of comfort for criminals than working class men could procure outside jails by honest labour. This prejudice involves a series of fallacies. Crime like disease is a social phenomenon which has to be treated by the State on public considerations and not on grounds of the condition or capacity of the individual involved in the process of treatment. Can the State hospitals treat the working class patients with rags, dirty water, insufficient food and insanitary rooms simply because they are accustomed all their lives only to such things and can never get better things? Surely hospital treatment has not corrupted the poorer classes and tempted them to flock to hospitals. On this argument even school life cannot be made pleasanter for the poorer classes than their home life. Again, the task of running the jails is entrusted to the State and it has to carry it out in the most efficient and scientific manner. Simply because members of the lower classes cook their food wastefully and unhygienically and are irregular in their habits should the State also cook the food in jails in the same unscientific manner and avoid regularity of hours for food, work or sleep? Further, it is because the unfortunates were unable to acquire efficiency, regularity, cleanliness, hygienic purity, healthy food, reasonable comforts and healthy amusements that they came to grief. Again, if a certain amount of discomfort has to be present in jail life as an element of educative discipline there are scientific and select ways in which it may be caused. Notwithstanding the most painful penal discipline imposed in jails crime has not been on the wane. The experience of the last one century proves that crime has decreased in proportion to the removal of the discomforts of prisons. Abolition of dark cells has diminished prison insanity and suicide. The new treatment aims at converting the prisoners into good and efficient citizens. If it is recognised that the bulk of the criminals are unfortunate victims of some mental or environmental defect, their lot must evoke our sympathy and pity and none should grudge them a few comforts during the period of their forcible confinement and reformatory treatment.

All sense of abnormality must be eliminated. Hence jail dress must be the normal dress and nothing else. Those who can afford must be allowed to have their clothing and bedding as they like. Only extravagance, luxury, and display may be banned. The

poorer prisoners may be provided with decent and warm clothes and bedding.

Abnormality should disappear as regards food and drink. The system of prescribing individual scales should be abolished. There should be neither luxury nor meagreness in food supply. If one uniform standard of comfort cannot be had three standards of comforts for the A. B. C., classes should be arranged. Those who can afford must be made to pay. A sufficient number of vessels, at least a jug and two vessels, must be provided to each for drinking purposes. Abundant supply of drinking water must be allowed; butter milk must be provided for all classes. Milk, sugar, coffee and ghee must be allowed to A and B classes, and to C class at the option of the authorities there should be no penal diet as a punishment for any prison offence. Subject to medical opinion, fasting must be permitted to all during their respective fasting days. In special cases the hour of diet may be changed for select prisoners to meet religious susceptibilities or medical needs. In England charitable societies and individuals are allowed to send special food to prisoners on the occasion of festivals like the Passover.

The banning of news is cruel. Among other results it would incapacitate the prisoner after release. Those who can afford may be allowed to get their own papers and books. Every jail must maintain a reading room. Newspapers may also be circulated to the quarters of the prisoners by arrangement. It is also desirable to have a library. A system of circulating books must be arranged and prisoners must be encouraged to read books. Excepting papers and books which are banned to free citizens under any law or rule all other books and papers may be allowed to prisoners.

Politicals as well as detentional prisoners may be allowed visits and letters twice a week and the rest once a week. Bentham's scheme of allowing the public to inspect jails by charging a fee may be usefully adopted and tried; parties of students, boy scouts, volunteers, etc., may be allowed to pay visits. In England a holiday trip is provided for lifers. A batch is taken from Maidstone to Dartmoor for six weeks during summer and made to work on the moor. This improves their health, breaks down monotony, and banishes low spirits. Similar methods may be adopted here also. Deprival of letter writing and visits should not be made a punishment for prison offences as it would be really punishing the friends and relatives rather than the prisoner. As all prisoners cannot be located quite near to their homes the poorer classes cannot afford to visit the distant jails. Recently a practice has grown up in England of transferring the long-term prisoners to local jails for some periods to facilitate such visits. Mr. Triston suggests

that instead of this the Government may pay the fare of the relatives in deserving cases. But, temporary transfers are costlier and disturb the prisoner's work.

Organised indoor and outdoor games and sports must be arranged. Sports teams may be allowed to compete with outside teams. Boy scout troops may be organised among juveniles. Dramatic companies, cinemas and circus plays from outside may be allowed to hold performances occasionally in jails. Prison recreation rooms may be provided for indoor games; pursuit of hobbies, or reading, debating societies, music parties, etc, may be organised; gramaphones and radio may be provided.

(10) *Prison education.*—Literacy, first aid, personal hygiene, ethics, civics as well as a vocational course must be taught compulsorily to all. Other subjects such as languages, music, painting, literature, elementary science, philosophy or sociology may be taught as optionals. A system of honorary teachers from outside may be encouraged.

(11) *Prison labour.—I. Theory of compulsory labour.*—The Amercian separate and silent systems held that labour amounts to mental relief and acts as a comfort and diminishes the penal effects of solitary confinement. This view is now untenable. There is no reason to discriminate between detentional prisoners and others in regard to prison labour; for, the imposition of labour has no longer punishment as its sole object.

II. Aims of Prison Labour.—*(A)* One of the aims of prison labour is to serve as a form of physical exercise and to keep off idleness and monotony. Excepting the fanatics wedded to the extreme form of solitary confinement as punishment, none can oppose this. But even to-day deprival of work prevails as a form of punishment for prison offences. This must be given up..

(B) A second aim of prison labour is that it should operate as a deterrent. Imprisonment with hard labour and penal servitude were created in 1776 in England as substitutes for transportation. Penal servitude consists of three stages—detention in cell for 18 months, labour in public works prisons, release on parole. The Report of the Departmental Committee on persistent offenders 1932 has recommended the abolition of the distinction between penal servitude convicts and others. It is these prisoners that have built the Chatham Docks, the Portland Harbour, etc. Hard labour called "rigorous" in the I. P. C. is nowhere defined. The Report of the Commission of 1864 suggested that no labour is hard which 'does not visibly quicken the breath and open the pores'. Working the crank, working the tread-wheel, picking up of oakum, sorting of black and white oats or peas, these represented the principal forms of hard

labour. The crank became obsolete and the tread-wheel was abolished in 1902. Hard labour aimed at producing monotony and fatigue but no profit. The oats or peas were sorted and then mixed again for re-sorting. The labour was to be purely penal and deterrent. The Report of the House of Lords Committee on Prisons in 1863 described the aim of prison life as "hard labour, hard fare and a hard bed." This penal view of prison labour is best expressed in r. 978 of the United Provinces Jail Manual—"Labour in a jail should be considered primarily as a means of punishment and not of employment only; neither should the question of its being highly remunerative have much weight, the object of paramount importance being that prison work should be irksome, and laborious, and a cause of dread to evil-doers." This theory of prison labour is now abandoned everywhere. Art. 9 of the Russian Code sums up the position admirably—"The measures of social defence do not have for their object the infliction of physical suffering or the lowering of human dignity, nor are they meant to avenge or to punish." (J. Nehru, Soviet Russia, 1928, p. 101).

(*C*) Yet another object of prison labour is said to be that it is meant to compensate, in some degree the State which is the jailor. If imprisonment with hard labour stressed the penal theory of prison work, penal servitude involving employment in public works stressed its economic theory. In early days many English prisons were owned by or farmed to private profiteers who levied fees, sold goods and liquor, and exacted work for their profit. The office of Jailor was sold until a statute of 1730 prohibited it. In recent times in U.S.A. prison labour is sometimes farmed out to outside contractors. This has been condemned as legalised slavery. At present the economic theory has received great prominence and jails are carrying on industries on an extensive scale. The mat industry at Wakefield jail in England produces £ 40,000 per year. Nevertheless jail industries are very poor and economically unsound. The making of mail bags for post offices by the hand, the making and repairing of clothes by hand or the breaking up of stones into road metal, spinning and weaving, etc.,—these are mere waste of labour and time-killing jobs. Machinery could do these in no time and far more cheaply. A prison worker cannot earn one fourth of what a similar free worker earns for the same period. Notwithstanding such poor show, the industrialists are attacking jail industries as representing a competition with private industry and Trade Unionists are proclaiming a boycott of jail goods as being the products of sweated slave labour. The causes for this poor production are quite obvious. The majority of prisoners are unskilled and unfit for productive work. In their very nature they are a fluctuating population. Except in a big central jail a modern

type of industrial factory with machine labour cannot be started. Such a factory plant as well as technical overhead staff will cost much. Jailors and warders can only see to the occupation of time in prison labour but not to the quality of the work. Amidst the numerous occupations of jail life the time devoted for economic labour is too short. The majority of workers being unskilled and slow they would resent any skilled worker speeding up his work; if speeding up is forced upon them a large number would feign illness or insanity.

If jails are to be made self-sufficient the old fashioned methods of work and unskilled handicrafts should be discarded and work by machinery and uptodate industrial methods must be introduced. Such industrial organisation reforms the men, replaces the cell system by the camp system, and makes work and not discipline the main aim of prisons. The work must be run on pure business lines under expert supervision.

(*D*) Lastly, it is said that the object of prison labour is to train the prisoner to some trade which will be useful to him after release. It is not possible to teach any vocation to short-term prisoners. This has led reformatory theorists to object to short terms and demand a minimum being fixed. But moral welfare is not bound up with the efficient learning of a vocation. Where is the guarantee of employment for all those who learn it? Even for long-term prisoners, only handicrafts can be taught. They will be useless in this mechanical age. The jail-trained worker can never compare himself with the products of outside industrial and technological schools or with factory workers. Prejudice prevents employment for prisoners even if they receive perfect training. This would force recidivism and the recidivists will have no zest to learn anything more. They often use what they learn in jails in furtherance of crime.

The only alternative is to enforce work of an economic character which will in the end prove the most reformatory.

(12) *Prison Discipline.*—(*a*) *General.*—The aim of discipline in prisons should be educative and reformatory. The self-respect and sense of honour of the man must be evoked and an urge for self-control and self-improvement created in him. He must be made to look to the future and no attempts must be made to dwell upon his past deficiencies.

Prison Offences.—Prisoners violate jail rules for practically the same reasons for which free citizens violate penal law. Their mental defects and the cramping environment of the jail will be responsible for most of these contraventions.

To some extent prisoners feel like revolutionary criminals, that offence is their weapon of war against their enemy. Prisoners cooped up in cells, put through a course of unpleasant occupation, and without any sort of assistance, advice, co-operation or equipment may not be able to secure redress of their grievances.

Prestige offences for not saluting or standing up or showing respect to the officers should not be punishable.

Punishment.—The prevailing forms of prison punishment are flogging, solitary confinement, penal diet, and deprival of comforts and privileges. Modern opinion is opposed to any of these punishments. Triston wants the abolition of prison punishment altogether; imprisonment is itself a great punishment; why then subject the man to an iron discipline and inflict further punishment? That course would be vindictive. The only form of punishment that may be adopted in prisons should be a moderate deprival of rewards and remissions.

The Prison Act of 1898 in England took away the power of corporal punishment from the governors and vested it in the Visiting Committee. The Board of Management now proposed for all jails must be made responsible for all prison punishment.

A public reprimand in the presence of all prisoners will very often be a very good form of punishment. In the case of grave offences with violence the prisoners may be assembled and consulted to determine the punishment. Development of some sort of self-government in jails would go a great way in solving the problem of jail discipline.

Rewards and remissions.—It is unnecessary to enumerate the methods of rewards now in vogue in different countries. All the best and useful methods may be adopted. The Collective Marks System experimented by Alexander Maconochie in Bermingham in 1849 may be adopted everywhere. The prisoners are divided into groups of eight. The marks of each group are pooled together and rewards are determined on the total marks of the group and not on individual marks. If any one errs, his group suffers and his companions would act as guards against his delinquency. The marks system must also be modified in accordance with age, health, and status of the prisoner. Gratuities by way of doles are not desirable. As already suggested a share of the earnings in jails must be distributed to the prisoners.

SUMMARY OF ENGLISH CASES.

MILLIGAN *v.* MILLIGAN, (1941) 2 All.E.R. 62 (P.D.A.).

Husband and wife—Restitution of conjugal rights—Jurisdiction—"Matrimonial home when co-habitation ceased"—Whether physical home necessary.

The phrase "matrimonial home" extends in relation to a Court's jurisdiction, to the husband's residence within such jurisdiction in such circumstances that any husband similarly circumstanced and not estranged from his wife would set up his house within such jurisdiction at the time when co-habitation ceased. A wife's action in that place for restitution of conjugal rights is within jurisdiction.

In re KAY AND LOVELL, TRUSTEE *v.* MOORE AND QUAIFE, (1941) 2 All.E.R. 67 (Ch.D.).

Bankruptcy—Power to reopen transactions.

The Court has no jurisdiction to make an order which would in effect be an order reopening the accounts which were already dealt with in the Master's certificate and the question of remuneration which the Master allowed to a receiver in an earlier partnership suit between the bankrupts.

PROCTOR *v.* PEEBLES, LTD., (1941) 2 All.E.R. 80 (C.A.).

Practice—Agreed medical report—When to be allowed in trial—Desirability of having medical witnesses available for cross-examination.

In a case where prognosis is an important matter it is most desirable that a doctor or doctors should be present in Court to answer any questions that the Judge may wish to ask. The Master or Registrar should consider whether the case is suitable for hearing with a medical report agreed between the parties.

KING *v.* KING, (1941) 2 All.E.R. 103 (P.D.A.).

Divorce—Desertion—Marriage contract providing that matrimonial home was to be at wife's place of business—Effect on husband's right to dictate where the matrimonial home is to be—Refusal by wife to move to house selected by husband—If desertion—Agreement—If opposed to public policy.

Where before marriage the husband had agreed to allow the wife to continue her own business and to make her business premises the matrimonial home, the husband cannot subsequently insist on his right to select a different matrimonial home and if the wife refuses to move to the home selected by him to charge her with desertion. There is nothing opposed to public policy in such an agreement and the husband by making it an excuse to stay away from the wife is guilty of desertion.

CONSTANTINE S.S. LINE *v.* IMPERIAL SMELTING CORPORATION, (1941) 2 All.E.R. 165 (H.L.).

Contract—Charterparty—Frustration caused by accident to ship—Burden of proof as to absence of negligence.

The appellants chartered their vessel the *Kingswood* to the respondents to carry a cargo from Port Pirie in South Australia to a British Port. A few days after her arrival off Port Pirie but before she became an "arrived ship," a violent and unexplained explosion took place on board. The damage caused to the steamer by the explosion was such as to frustrate the commercial object of the adventure. In an action by the charterers for damages, the shipowners claimed that they were absolved from all further liability.

Held, that the burden was on the party denying frustration to prove negligence or default of the party setting up the plea. Frustration will excuse non-performance unless it is proved to be self-induced.

Decision of Court of Appeal, (1940) 3 All.E.R. 211, reversed and that of Atkinson, J., (1940) 2 All.E.R. 46, restored.

FOAMINAL LTD., *v.* BRITISH PLASTICS, LTD., (1941) 2 All.E.R. 393 (K.B.D.).

Contract—Damages—Failure to deliver goods—Loss of co-operation of editors who had written advertisement puffs in their periodicals—Damages—Right to.

The plaintiffs who were suppliers of cosmetics to the public contemplated putting on the market a new summer cream in small attractive containers suitable for ladies to carry about in their handbags. The plaintiff's managing director secured the co-operation of certain beauty editresses to write " puffs " of the product and also include in their columns particulars of a half price offer which said in substance " post me your name and address together with $7\frac{1}{2}$ *d.* in stamps, it will be sent to you by return." In response some 3,000 orders were received.

The plaintiffs had entered into a contract with defendants for the supply of 10,000 of these containers which had to be specially made, and were not available in the market. In an action for damages for breach of the contract to supply the containers, claiming *inter alia* damages for the loss of the future co-operation of the editresses,

Held, that the plaintiffs were not entitled to damages for loss of co-operation of the editresses in the absence of proof of essential facts to support such claim as one for loss of reputation.

The mere fact that pecuniary loss is brought about by the loss of reputation caused by a breach of contract is not sufficient to preclude the plaintiff from recovering in respect of that pecuniary loss.

To recover damages under this head the plaintiff must prove with sufficient certainty (1) the occurrence of the pecuniary loss and (2) that such loss was within the contemplation of the defaulting party at the time when the contract was made.

KING FEATURES *v.* KLEEMAN, LTD., (1941) 2 All.E.R. 403.

Copyright Act (1911), *S.* 22—*Scope.*

In construing S. 22 (1) of the Copyright Act, 1911, it is convenient to disregard the double negative and treat the section as though it read "The Copyright Act shall not apply to the designs of works used or intended to be used as models or patterns to be multiplied by any industrial process where the designs of such works are capable of being registered under the Designs Act." "Design" may be embodied in a sketch illustrative of the model itself, *e.g.*, in a sketch of a brooch or doll or in a brooch or doll itself. Unregistered designs are not subject of design copyright. But original sketches or cartoons not used or intended to be used as models or patterns to be multiplied by any industrial process, retain their copyright and their owner can prevent infringement of such right.

Re SEAD, LTD., (1941) 2 All.E.R. 466 (Ch.D.).

Companies Act (1929), *S.* 294—*Application for avoidance of dissolution —Limitation.*

The period of two years, for making an order declaring a dissolution void, is to be decided by taking the period between the date of the dissolution of the company and the date when the application under S. 294 of the Companies Act, 1929 is made. The order itself on such application need not be made within two years. (S. 294 provides *inter alia* that the Court can declare the dissolution of a company void at any time within two years of the date of the dissolution.)

CUMPER *v.* POTHECARY, (1941) 2 All.E.R. 516 (C.A.).

Practice—Payment into Court—Withdrawal of whole or part by person paying in—When permissible.

Where a defendant has paid money into Court he is not entitled to resile from that step as of right. He must show that there are good reasons, such as for instance the discovery of further evidence which puts a wholly different complexion on the case or a change in the legal outlook brought about by a new judicial decision, etc., for his resiling. The Court should consider whether there is a sufficient change of circumstances since the money was paid in, to

make it just that the defendant should have an opportunity of withdrawing or reducing his payment.

WINCHESTER COURT, LTD. *v.* HOLMES, (1941) 2 All.E.R. 542 (K.B.D.).

Lease—Provision for six months' notice to determine tenancy—Notice terminating lease " at the end of the last quarter "—Sufficiency.

A lease commencing from January 1, 1937 provided that the tenant had the option of determining the tenancy at the end of the third or fifth year by giving the landlord or his agent at least six months' previous notice in writing of his intention to do so. The lessee assigned his rights to a major who was called for military service. By a letter dated June 30, 1939, sent to the agents of the landlord who received it the same day, the assignee of the lessee wrote as follows : " I hereby give you formal notice of termination at the end of the last quarter of this year."

Held, that there was no ambiguity in the notice and termination at the end of the current year was meant.

R. *v.* SECRETARY OF STATE FOR INDIA, (1941) 2 All.E.R. 546 (K.B.D.).

Extradition—Application for—Expert's evidence as to Indian Law—How far conclusive.

Practice—Counsel giving evidence—Propriety—Fugitive Offenders Act, 1881.

In an application for the issue of a writ of *habeas corpus* against committal to prison of a fugitive offender from India before being sent to India without order of the Magistrate for extradition under the Fugitive Offenders Act,

Held, (i) All that is necessary while asking for extradition is to show that the person against whom the order is sought is one accused of having committed an offence in India and that he has left India, when he becomes, in the words of the Act, "a fugitive from India."

(ii) All that is required in this case is a warrant issued in India by a person having lawful authority to issue it duly endorsed and authenticated in the United Kingdom for an offence to which the Fugitive Offenders Act applies.

(iii) No objection to a warrant on the ground of duplication can be effective although the prosecution may be called upon to elect because the committal for one of those offences is not rendered void by the inclusion in the warrant of another charge upon which no committal was asked for or has been ordered.

(iv) Depositions taken in India in the trial of the co-conspirators, but in the absence of the fugitive are not rendered inadmissible by reason of the fact that they were not taken "for the purposes of the Fugitive Offenders Act."

(v) The fact that only part of the depositions was used in the Magistrate's Court did not make them inadmissible either.

(vi) Where an affidavit of an expert on Indian Law was nothing more in truth than a forensic argument, the Court would be justified in interpreting for itself the relevant Indian statutes.

(vii) A barrister should not act as both counsel and witness in the same case.

(viii) The apprehended risks of war to which the fugitive will be exposed while travelling to India is no ground for interfering with the course of law.

In re KNAPTON, (1941) 2 All.E.R. 573 (Ch.D.).

Wills—Bequest of "one house to each of my nephews and nieces and one to N. H., one to F. K. and one to my sister and one to my brother"—Allotment of the houses.

A will provided: "I give and bequeath my estate as follows: . . . . . . one house to each of my nephews and nieces and one to Nellie Hird, one to Florence Knapton, one to my sister, one to my brother. . . . "

Held, that the devises are valid and the choice is to be given to the several devisees in the order in which they are named including the nephews and nieces. If they cannot agree the choice must be determined by lot.

In re OWERS, (1941) 2 All.E.R. 589 (Ch.D.).

Wills—Executors—Personal liability in respect of leaseholds—Right to indemnity from estate.

Executors are at liberty to retain out of the estate a fund by way of indemnity against their personal liability in respect of leaseholds in the possession of the testator at his death vesting in them.

GAUNT *v.* INLAND REVENUE COMMISSIONERS, (1941) 2 All.E.R. 662 (C.A.).

Income-tax Finance Act, 1938, *S.* 38—"*Wife*" *if includes* "*widow*" —*Liability of income under settlement to tax.*

The word "wife" should extend to the case of "widow" and the income under a settlement where the "widow" of the settlor

might benefit after the settlor's death is liable to income-tax and sur-tax under S. 38 of Finance Act, 1938.

(1941) 2 All.E.R. 82, reversed on this point.

CUSHING *v.* WALKER AND SONS, (1941) 2 All.E.R. 693 (K.B.D.).

Tort—Nuisance—Slate on roof rendered insecure by enemy action—No proof that owner knew of unsafe condition—Plaintiff injured by falling of slate—Defendant not liable for continuing the nuisance.

Plaintiff was injured by the falling of a slate from the roof of defendant's premises. It was found that the insecurity of this slate which caused the defendant's premises to become a nuisance arose from enemy action. In an action for damages, *held*, on the evidence that it could not be said that with the exercise of reasonable care and skill the defendants ought to have known that their roof had been rendered unsafe and therefore there was no wrongful act in continuing the nuisance.

HICHENS & CO. *v.* JACKSON & SONS, (1941) 2 All.E.R. 704 (C.A.).

Stock exchange—Vendor repudiating contract—Duty to broker—Company refusing to register transfer on account of caveat *from original owner—Broker if bound to replace shares—Broker if entitled to indemnity.*

A broker for sale of shares even if acting as principal, has performed all his duties when he hands over to agents acting for the transferee, a duly executed transfer together with the certificate. He is under no duty to procure the registration of the transfer and if the buyer wishes to protect himself he must see that registration is guaranteed. Accordingly where the company refuses to register a transfer by reason of a *caveat* from the transferor, the broker is under no duty to buy other shares and replace the stock and he cannot claim indemnity from the vendor of the shares. (1941) 1 All.E.R. 562, reversed.

CAMKIN *v.* BISHOP, (1941) 2 All.E.R. 713 (C.A.).

Tort—Negligence—School boys allowed to volunteer for work on farms on holidays—Injury while so working—Headmaster if liable for damages for not providing proper supervision.

Some boys including the infant plaintiff from a school volunteered for farm service on a half holiday at a farm near the school. They were not accompanied by any master to supervise or control them. They were to receive 6 *d.* per hour for their work, the wages being paid to the school for them. After starting work, when the farmer was absent the boys began playing the fool by throwing potatoes at each other and continued their ragging for 30 or 40 minutes. One boy uttered something opprobrious to another boy, which angered

the latter, who replied by throwing a lump of earth at his insulter, who ducked his head and escaped the missile which unfortunately hit the infant plaintiff gravely injuring one eye which had to be removed. In an action by the father of the plaintiff for damages against the headmaster of the school,

Held, that the duty of the headmaster being that of an ordinary careful parent, there was no breach of duty in allowing the boys to work on the farm. No headmaster is obliged to arrange for constant and perpetual watching out of school hours.

SCOTT *v.* SEYMOUR, (1941) 2 All.E.R. 717 (C.A.).

Workmen's Compensation Act (1925), *S.* 1 (i)—*Domestic servant taking master's tea to fields—Returning back to farm on horse back—Injury by horse bolting—If accident " arising out of employment."*

A girl of 15 to 16 years of age was employed as a domestic servant by a farmer. One day she was asked by the farmer's wife to take a can of tea to the farmer, who was working two miles away in a field. She took the tea to the farmer and waited until he had consumed it, when it was her duty to take the empty can back to the farm. One of the horses in the field was going back to the farm. She asked the man in charge of the horse if she might ride the horse and he let her do so as she was accustomed to riding. The horse was startled and the girl fell off and injured herself.

Held, that as it was not an obviously reckless or dangerous way of returning to the farm and the accident arose out of her employment within the terms of the Act she was entitled to recover compensation.

JOTTINGS AND CUTTINGS.

Books of Legal Reminiscence.—We have it on high authority that of the making of books there is no end, a statement the generality of which may with equal force be applied to those works which are devoted to legal reminiscence. Books of this type are plentiful enough but they are certainly not all of equal merit; indeed many of them ought strictly to be required to show cause why they were ever written. On the other hand, there is a select number of works belonging to this class which are not only admirably written but are likewise packed with stories told with rare skill and art which make them particularly inviting, and among this select class must certainly be numbered that charming book which came from A.J. Ashton, K.C., whose early death in 1925 not only made a conspicuous gap in the ranks of leading silks but likewise in those of skilled reconteurs. To his recollections published under the title " As I went on my way " attention was called in these columns many years ago, but much

was left unsaid which was almost of equal value and interest some of which may now be added on a rereading of the book.—*L.T., 1941, p. 23.*

An Awkward Ambiguity.—Lord Russell of Killowen, the father of the present peer bearing that title, that is, the great Lord Chief Justice, on one occasion, while sitting in the Court of Criminal Appeal, recalled a curious incident which happened to him while on circuit. The question was being discussed as to a jury being told of any previous convictions recorded against a prisoner, and the Lord Chief, in afterwards referring to the matter, said "an innocent remark of mine once gave this information to the jury. The prisoner was defending himself with much ability but he spoke so low as to be frequently inaudible, and having once said something I did not hear, I said, 'What was your last sentence?' Immediately came the reply, 'Six months, my Lord!'"—*L.T., 1941, p. 72.*

Lord Eldon and John Clerk.—Looking back on the venerable figure of Lord Eldon we instinctively think of him as the embodiment of equity and devoid of anything resembling humour. It would, however, be a mistake so to regard him. In turning over an old scrap book with miscellaneous contents the present writer came across a story about Eldon and John Clerk of the Scots bar, who later became a judge of the Court of Session with the title Lord Eldin, which may well bear repetition. It seems that Clerk retained many of the old-fashioned pronunciations to which he had been accustomed in the north, and on one occasion, appearing in the House of Lords during the tenure of the Chancellorship of Lord Eldon, he was pronouncing the word "enough" as "enow," and having done so in various parts of his argument, the Chancellor at last interposed with the remark: "Mr. Clerk, in England we sound the 'ough' as 'uff'—enuff not enow." "Verra weel," continued the self-possessed pleader, "of this we have had enuff; and I come, my Lord, to the sub-division of the land in dispute. It was apportioned into what in England would be called pluffland—a pluffland being as much land as a pluffman can pluff in one day." The Chancellor could not resist the ready repartee, and burst into a loud laugh, and said, "Pray proceed Mr. Clerk, I know enow of Scotch to understand your argument." Besides the humour of the story the anecdote again incidentally illustrates the occasional anomalies of English pronunciation.—*L.T., 1941, p. 73.*

Juvenile Crime.—Public attention has recently been drawn to the increase in juvenile crime that has taken place since the outbreak of the war. Mr. Watson G. Boyce, the probation officer at the

Southwark Juvenile Court, told the Howard League for Penal Reform at a luncheon on 6th March that juvenile delinquency had been accentuated by the conditions arising out of the war. Among the group from eight to fourteen years of age, he said, the loss of the sense of security, with sudden death almost a commonplace, fathers and relatives being away, perhaps never to return, and mothers hard worked and depressed, had brought about the increase. He alleged immorality in shelters and said that the rise in the wages of adolescents from £ 3 to £ 6 a week gave them far too much money to spend and drunkenness was increasing. A short article appeared in *The Times* of 8th March, in which it was stated that inquiries among welfare workers had shown that though Mr. Boyce's picture was overdrawn, the situation was nevertheless serious. Various reasons, such as lack of discipline owing to absence of parents, the closing of schools for long periods, the closing of clubs and the use of playing fields for other purposes, evacuation, the time spent in shelters and the inability of juvenile courts to impose suitable deterrent punishment, were all mentioned as causes of the increase in juvenile crime. The Chairman of the East London Children's Court, Mr. B. Henriques, said that clambering over air-raid ruins and taking useless articles led to irritating charges of looting, and certain serious offences, such as housebreaking, were planned in the shelters. Much of this was due to a spirit of adventure that needed guidance into right channels. The evil effect of sudden wealth on undeveloped minds is undeniable. At Lambeth Juvenile Court on 6th March a girl of fifteen earning 37s. a week and a boy of sixteen earning £ 3 a week were charged with larceny. On the same day, at West London, Sir Gervais Rentoul had occasion to tell four boys, one of whom he sent to Borstal, and two to an industrial school, that the high wages paid them were having a bad effect. A recent investigation has shown that the proportion of young persons arrested singly is about 40 per cent., the remainder being arrested in gangs which number from two to eleven persons, the overwhelming majority of which are two, three or four in number. Obviously the cause of the increase, though apparently multiple, is in reality unitary, and can be traced to the unnatural and morally unhealthy conditions under which many children and young persons are now living in towns. The remedies must be not merely the negative one of evacuation, but the positive harnessing of the activity of young people to useful work where schooling is necessarily restricted, and, without attacking any decent standards of life, compulsory restriction of spending money. *S.J., 1941, p. 146.*

Disenchantment.—At Birmingham Assizes recently Mr. Justice Cassels remarked that the fact that married people do not get on well

together is not quite a ground for divorce at the moment. He added : " There have to be grounds, otherwise we shall have people coming here and saying, 'She is not so good-looking as I thought.' " It might very well have been otherwise if certain eighteenth century legislators had had their way and succeeded in getting through Parliament a Bill in the following terms : " That all women of whatever age, rank or profession, whether maid or widow, who shall after this Act impose upon and seduce into matrimony any of His Majesty's subjects by means of scents, paints, cosmetics, artificial teeth, false hair, bolstered hips, high-heeled shoes, or iron stays, shall incur the penalties against witchcraft and the marriage be declared null and void." Few marriages could stand a test like that. On the whole, judges seem to take a view of matrimony so sober as to be definitely discouraging. Only last year in the Divorce Court, when a counsel asked his client the routine question, " Was your marriage happy at the start?" Mr. Justice Bucknill intervened to say, " We cannot assume that marriage is a state to which the word 'happy' can properly be applied. It is enough if a spouse can say that it was even normal."—*S.J.*, 1941, *p.* 151.

In the Dark.—Just after the jury had brought in a verdict of 'Guilty' in a sensational case at the Old Bailey recently, the lights mysteriously went out, and in the darkness there were shouts of " Black justice !" from the dock. (It turned out later that the incident arose merely from the conscientiousness of an electrician following a black-out routine.) The thing reminds one of the verses addressed to Mr. Justice Day on an occasion when he proposed to sit long into the night to try some prisoners :

" Try men by night ? My lord, forbear !
Think what the wicked world will say.
Methinks I hear the wretches swear
That Justice is not done by Day."

Once at Stafford the court lights failed just as the jury had returned to deliver their verdict in a murder trial. For several minutes the room was in complete darkness, till a few lighted candles were brought. By their flicker you could see the outline of the face of Mr. Justice Pickford and of the prisoner in the dock. Gravely the foreman of the jury announced the verdict of " Guilty," and the judge assuming the black cap, pronounced sentence of death, which the prisoner received without visible emotion. Sometime ago while the late Mr. Martin O'Connor was arguing a case in the Court of Mr. Justice Acton, he said : " Every electrical device in the world is likely to go wrong." At that very moment the lights in the court fused and went out, leaving the place in darkness. " Well," said

the judge's voice, "that certainly supports your argument. I am sure no one can say you have done it on purpose."—*S.J., 1941, p. 151.*

The Week's Personality.—The family tree of the Pollocks has borne varied and good fruit in the legal world, and Sir Edward Pollock, ninth son of the great Chief Baron, was no disappointment. It is true that he first embarked on a medical career, but absence on a prolonged tour in the United States lost him his practice and accordingly he returned to the family tradition and was called to the Bar in 1872. Misfortune, however, pursued him and an operation to his vocal cords spoilt his chances as an advocate. In 1897 he succeeded Mr. Justice Ridley as Official Referee. In his amusing book "Life, Law and Letters," Mr. E.S.P. Haynes printed a witty verse, in carol style, sent him by a friend of the family :

"There came three Pollocks on Christmas Day
To see what they could find.
The first to come was deaf and dumb
And the others were totally blind.
And one of them sits in the Court of Appeal
And one in the K.B.D.
And the oldest one, who is deaf and dumb,
Is Official Referee."

Mr. Haynes adds that though the operation had reduced Sir Edward's voice to a whisper, it was the most penetrating sound known to him and could be distinctly heard through the whole compartment of a tube train in motion. He performed his laborious duties with ability and conscientiousness till he retired in 1927 at the age of seventy-seven.—*S.J., 1941, p. 189.*

The Liar.—As a classic judicial description of a liar certain words of Mr Justice Hallett at Manchester Assizes recently would be hard to beat. He described "the hummings and hawings, the long pauses, hesitation and general atmosphere of hand-to-mouth but somewhat boggling inventiveness," and added "in thirty years in the legal profession I have seen many witnesses in the box who have conveyed to me a clear impression that they were lying. I do not think I have ever seen a witness who did so as thoroughly as Pearlberg." For more than other places the courts require varied formulæ for expressing disbelief. There was, for instance, the subtle method of Mr. Justice Hamilton, who once said to a jury in a City case : "On the occasion in question, if the defendant is to be believed, he exhibited the dignity of a grandee of Spain and the resignation of a Christian martyr. The defendant, you will remember, is a company promoter." The Irish have a more whimsical way sometimes, as

when a prevaricating witness broke down under the cross-examination of the great Curran to protest to the judge: "My lord, I cannot answer Mr. Curran; he puts me in such a doldrum." "What *is* a doldrum, Mr. Curran?" asked the judge. "My lord," was the reply, "it is a common complaint with persons like the witness. It is confusion of the head arising from corruption of the heart." More blunt and pointed was Judge Adams at Limerick, when he said to a plaintiff: "Look here, sir, tell me no more unnecessary lies. Such lies as your attorney advises you are necessary for the presentation of your fraudulent case I will listen to, though I shall decide against you, whatever you swear, but if you tell me another unnecessary lie, I'll put you in the dock."—*S.J. 1941, p. 189.*

BOOK REVIEW.

"PRINCIPLES AND FORMS OF PLEADINGS," by S. C. Ghosh, 1941, royal octavo, 1410 pages, price Rs. 16. The Eastern Law House Ltd., Law Publishers, 15, College Square, Calcutta.

We heartily welcome this publication on this important subject. The Civil Justice Committee in their Repoıt in 1924 deploıed the lack of books on Pleadings in India. The Committee said that there was a great need for books in India like Bullen and Leake, and Odgeıs on Pleadings in England. Indian Pleadings have been repeatedly criticised by high authority as being often loose, prolific and defective. The Committee observed that Indian lawyers have to be trained in the art of drafting pleadings and suitable Indian books are required for that purpose. Since then, there have been some well-known publications, but it cannot be said that these books have achieved the purpose desired by the Civil Justice Committee and that Indian Pleadings have attained perfection such as is claimed for English Pleadings. Hence a comprehensive and thorough treatment of the subject as has been attempted in the publication under review is highly welcome.

Mr. Ghosh's book deals in Part I, with the history of Pleadings. In this part he deals not merely with Pleadings during the time of the British Courts but has also given a brief account of the history of Pleadings in the ancient Hindu and Mohammadan periods of administration. In Part II, he deals with general principles on Civil Procedure, Joinder of parties, Causes of action and Jurisdiction of Courts and the Rules of the Code of Civil Procedure on these matters, etc. Then he deals in Part II with the Rules of Pleadings. In Part III he sets out Forms of Petitions and in Part IV Forms of Pleadings. In Part II questions of Procedure and Pleading are dealt with exhaustively and with a full citation of case-law. The

Parts in which the Forms are given are equally full and contain also notes of cases relating to the subjects on which the Forms are given. A great deal of labour has been spent upon this book and we commend it to the legal profession. The book is well got-up as is only to be expected of a publication by a firm of well-known Publishers like the Eastern Law House, Ltd., Calcutta. There is a Foreword by the Hon'ble Mr. Justice Lort Williams of the Calcutta High Court.

CENTURY EDITION OF ALL INDIA CRIMINAL DIGEST (1840-1941), Vol. I, by A. N. Khanna, Advocate, High Court, Lahore, published by Atma Ram and Sons, Lahore.

We welcome with pleasure the first volume of the "Century Edition of All India Criminal Digest, 1840-1941," by Mr. A. N. Khanna. Mr. Khanna is well-known to the legal world by his commentary on the Court-Fees Act and the Partnership Act. His present work covers a different but a wider field. The volume under review serves the double purpose of a digest and a subject index. In view of the vast accumulation of case-law, the author has adopted the somewhat original method of dividing the case-law into two sections, one dealing in comparatively fuller detail with the case-law from 1901-1941 and the other dealing in shorter compass with the cases before 1901. This method has the advantage of placing first before the reader the recent case-law on the subject, and avoiding the necessity of merely reiterating—almost in identical language as not unoften happens—propositions well-established. The matter is everywhere divided into headings and sub-headings which make for greater clarity and accuracy.

We are sure that the book will be welcomed widely.

INDIAN COMPANY RULES AND FORMS, by Lakshmi Narain Mehra, B.A., LL.B., Pleader, Chandni Chowk, Delhi, 1941. Price As. 8/-.

The above publication contains 47 new company forms for use from 1-4-1941 as also some other forms like application for shares, company's receipt for application money, etc. Under each form, short notes have been added ; these will be found helpful in practice. The booklet contains the Indian Companies Rules, 1941, as amended up-to-date. The book, we are glad to see, is priced very low so as to be within easy reach of all interested.

DEBT RELIEF IN THE MADRAS PRESIDENCY, by Messrs. S. Subramanya Sastri, B.A., B.L., and V. Suryanarayana, B.A., B.L. Price Rs. 2-8-0.

We have great pleasure in welcoming this latest contribution on the debt relief law in the Presidency. The authors have success-

fully produced in a compendious book of under 280 pages a full and critical commentary on the Madras Agriculturists' Relief Act, the Madras Debt Conciliation Act, The Madras Debtors' Protection Act and The Usurious Loans Act. We note that the authors have adapted into their commentary the *ipsissima verba* of the learned judges themselves but have yet by a process of judicious selection managed to keep the book well within bounds as regards size. The commentary under each section is preceded by a synopsis which would be helpful to the busy practitioner. An attempt has been made to resolve conflict of decisions and where the matter is *res integra* the authors have given us the benefit of their opinion on the point in issue.

Considering the large output of literature recently on the Madras Act IV of 1938, a book like the one under review giving in concise form a commentary at once explanatory and critical is a desideratum. We are glad to see that the same care has been bestowed on the other Acts also by the learned authors. The several appendices to the book contain the statement of objects and reasons and the general rules and forms under the respective Acts.

Parallel references have been given to every case and even short notes of cases have been adverted to. These features are sure to add to the utility of the book. The printing and get-up are all that can be desired.

An Introduction to the Law of Limitation and Prescription in British India, by K. J. Khambatta, 4th edition, 1941, published by N. M. Tripathi & Co., Bombay. Price Rs. 4-4-0.

To have run through four editions in the short space of a decade is an achievement and speaks much for the popularity and utility of the work; and Mr. Khambatta is to be congratulated on the fourth edition of his masterly little book on the Law of Limitation and Prescription, which has just been published by Messrs. N. M. Tripathi & Co.

The book is intended primarily for students of law and to that end the author has very lucidly and in very simple language expounded the general principles of the subject. This method of treatment is analytical from start to finish and there is a wholly original and quite interesting regrouping of the sections of the Limitation Act—an Act which has been blest in various quarters as the "worst drafted piece of legislation in India." Alongside there is a brief critical commentary on the several sections. The first chapter deals with a number of topics not dealt with in the Act, but which are very intimately related to and which in fact form the foundation of the law of limitation, such as the legal theory underlying limitation,

prescription, the distinction between estoppel, acquiescence and laches as bearing on the law of limitation, etc.

The rules set out in chapter II as regards the time limits under the various articles are sure to be of great help to the student. The *termini a quo* have also been classified with reference to generalised rules an appreciation of which will tend to fix them easily in the memory.

Chapter III deals on some important parts of the subject like acknowledgment, fraud, adverse possession etc. But the book, while excellently serving the purpose of a student's manual, is sure to be of great use to practitioners also. We are pleased to find that the author has crammed into the footnotes a good lot of case-law treating on the subject and has made a critical commentary on the Act, giving the reader the benefit of his individual views on particular decisions. The recent pronouncement of the Judicial Committee in Rama Shah's case has been made the subject of a critical note. Other important pronouncements have been noticed in appropriate places. Altogether it is a book which is sure to be useful to students and practitioners alike.

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MADRAS LAW JOURNAL.

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CAN A MINOR'S SUIT *IN FORMA PAUPERIS* BY A NEXT FRIEND BE DISMISSED FOR DEFAULT OF APPEARANCE?

BY

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Can a suit by a minor by a next friend, instituted *in forma pauperis*, be dismissed for default of appearance of such next friend when the suit is called on for hearing or should it be kept pending till the minor attains age when he Could elect to proceed with the suit or not? In one case the lower Court had dismissed such a suit for default, and when an application for restoration was made, the suit was restored on the terms, that the plaintiff should pay the entire cost of the defendant and also the court-fee due to Government. In an appeal against the final order of dismissal praying for disannexing the onerous condition from the order, the appellate Judge, held that an appeal lay against the order as passed, modified the same by setting aside that portion of the order relating to payment of court-fees due to Government and ordered restoration of the suit, if payment of the other costs was made within a time to be fixed by that Court.

The question is whether in those circumstances the trial Court had at all power to dismiss the suit for default. Contrary to the ordinary run of suits where adequate court-fee is paid on the relief claimed in the plaint, there are two special features in this case, *viz.*, minority and pauperism. The provisions of O. 32 and O. 33, Civil Procedure Code, contain special rules applicable to such cases, not only in the matter of payment of court-fees and other costs but also in that of conferring privileges on minors. S. 35, Civil Procedure Code relating to the nature and extent of the powers of Courts to award costs in suits is made subject to rules. Besides the relevant rules found in the two Orders, we have the

decisions in *Kesho Pershad* v. *Hirday Narain*[1], *Kathasawmy* v. *Ramachandran*[2], *Venkataratnam* v. *Nagappa*[3], *Chinnasubbarayudu* v. *Veeraswami*[4] and *Venkatasurya Subbarayudu Sowcar* v. *Bapannarao Sowcar*[5], bearing on this point. The first four cases lay down in clear and unmistakable terms that the Court, whether it had power to dismiss a suit, for default or not, must automatically restore the suit as in cases like the present a minor could not appear personally in the eye of law and the non-appearance of the next friend who merely acts for him could be regarded, at the worst, only as neglect of duty on his part in which case provision is made for his removal or appointment of another next friend—*vide* O. 32, r. 6, Civil Procedure Code. The last of the decisions referred to without saying that the earlier Madras cases were wrongly decided, proceeded to correct the view that a minor's suit dismissed for default of appearance, should be automatically restored. The then Chief Justice who was a party to one of the earlier cases explained his own view and stated that suits could be dismissed but that restoration depended, as in other cases on the *bona fides* of the absence of the next friend. With due respect to the learned Chief Justice, it must be observed that there was no warrant for going back on the point of view which was propounded by him before (and also as early as in *Kesho Pershad* v. *Hirday Narain*[1], and followed since). If only the attention of his Lordship had been drawn to the decision in *Doraswami* v. *Thungasami*[6], his decision might have been different. That was a case under the old Code, but the language of the corresponding provision is the same. In that decision Mr. Justice Bhashyam Aiyangar had observed: "it is clear that the Subordinate Judge failed to exercise the jurisdiction which the Court by reason of the petitioner (plaintiff in the suit) being an infant had over the conduct and disposal of the suit and to realise his responsibility in the matter. The suit has the effect of making the minor a ward of Court. It is therefore the duty of the Court not to permit him to prejudice the interests of the minor, but to adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next friend and appointment of a new next friend, or in order that the minor plaintiff himself, may on coming of age, elect to proceed with the suit or withdraw from it". It is strange that this case was not noticed in *Venkatasurya Subbarayudu Sowcar* v. *Bapannarao Sowcar*[5]. It is to be hoped that when the same point comes up again, the question will be more fully considered and the principles finally enunciated for the

1. (1880) 6 Cal. L.R. 69.
2. (1934) 66 M.L.J. 683.
3. (1934) 66 M.L.J. 387.
4. (1934) 41 L.W. 117.
5. (1935) 68 M.L.J. 615.
6. (1903) 14 M.L.J. 159: I.L.R. 27 Mad. 377.

guidance of Courts. It may be urged that to uphold the view in *Doraswami Thungaswami*[1], would amount to the default provisions in the Code not being applied at all to the case of minors, but that is a lacuna, if at all, which can be cured only by a legislative enactment. Probably, as the Orders indicate, the policy of the law is to treat minors as belonging to a favoured class alongside of paupers, who are obliged to pay court fee only at the end of the litigation. So much for the question of dismissal of the suit or the restoration thereof.

So far, however, as the condition of payment of all costs and court-fee due to Government is concerned, it seems that according to the true view, the Court can legitimately order, if at all, only the payment of day costs. The question in one form came up recently, in a case reported in *Raju Chettiar* v. *Ramakkal*[2]. That was a case where the plaintiff, a minor suing by a next friend, was not ready to get on and applied for an adjournment of the suit. The Court, after several adjournments, adjourned the suit with a direction that the plaintiff should pay day costs to the defendant as a condition precedent on or before the adjourned date. The legality of such an order was questioned and it was held that such an order was not illegal and could be enforced by the dismissal of the suit itself, that a pauper is exempted from payment of costs or other fees specifically mentioned in O. 33, r. 8, Civil Procedure Code, but there is no exemption from liability for day costs. Mr. Justice Krishnaswami Aiyangar recognised only the immunity for payment of the court-fee on the plaint and other proceedings mentioned in r. 8 of the Order. Whatever justification there was for the order in those terms, it looks as if it is limited to payment of costs or other fees except those specifically mentioned. In a case reported in *Lim Pin Sin* v. *Eng wan Hock*[3], the Judges felt themselves unable to hold that the order in that case was unjustified. That was a case of constant default and the dismissal of the suit as a last resort for default of payment of day costs within the time fixed was held to be valid. If the plaintiff is *sui juris* there is no harm in dismissing the suit, in consequence of the costs not being paid in time. As matters now stand, day costs alone can be ordered, but it will certainly be beyond the competence of a Court to order payment of court-fees due to Government, as a condition precedent to restoration, as such an order can be passed only at the time of the disposal of the suit, and as against a person *sui juris* but not as against a minor who cannot be held personally responsible for the misconduct or the negligence of the next friend. If *Doraswami* v. *Thungasami*[1] holds the field, such a

1. (1903) 14 M.L.J. 159: I.L.R. 27 Mad. 377.
2. (1941) 1 M.L.J. 305. 3. (1928) I.L.R 6 Rang. 561.

thing will never happen, as the suit has to be held up either till the minor attains age or another next friend is appointed, the Court being properly moved for the purpose.

COURT-FEES—A HISTORICAL RETROSPECT.

BY

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On perusing the Indian Court-Fees Act for the first time, one may notice certain curious words occurring in S. 3 of the Act suggesting that in addition to their regular salaries, clerks and officers of the High Court were in enjoyment of certain "fees" which the litigants had to pay out in order to make the wheels of justice move. The words are: "The fees payable for the time being to the clerks and officers (other than the Sheriffs and Attorneys) of the High Courts established by Letters Patent, by virtue of the power conferred by S. 15 of the Indian High Courts Act, 1861 or S. 107 of the Government of India Act, 1915 . . . shall be collected in manner hereinafter appearing". Under S. 15 of the High Courts Act and S. 107 of the Government of India Act, the High Courts are empowered "to settle tables of fees to be allowed to the Sheriff, Attorneys and all clerks and officers of Courts". The same words are repeated in S. 224 (d) of the Government of India Act, 1935. Tracing the matter back, one finds that the words in S. 3 of the Court-Fees Act have a hoary past and represent a state of affairs which had their roots far back in the history of English Law in feudal conceptions. The Charter of 1687 establishing the Mayor's Court at Madras empowered the Mayor and Aldermen "to appoint, raise, pay and allow such moderate and convenient salaries and fees to the said inferior officers . . . . . as to the said Court of Aldermen shall seem meet and convenient"; and the Town Clerk to be appointed thereunder was "to have and receive for his pains and care in that business such salary and such moderate fees (and no other) as the Court of Aldermen shall appoint". The Charter of 1726 after empowering the Mayor's Court "to nominate and appoint such clerks and officers . . . . as shall be found necessary", proceeded to say:

"And Our further Will and Pleasure is, and We do hereby require and command, that a Table of Fees to be allowed to such clerks and officers, shall be settled by the said Court, and approved and signed by the Governor or President of Fort St. George aforesaid, for the time being, and shall be wrote out fair, and kept constantly fixed up in some visible and open part of the room or place, where the said Court shall be held".

Evidently, it was feared that the clerks and officers might try to keep the Table of Fees secret and charge more than the prescribed fees—a fear that was not ill-founded inasmuch as the practice had been resorted to by officers of Courts in England in the 16th, 17th and 18th centuries. The Charter of 1753 while repeating the above, word for word, further provided:

"And that it shall and may be lawful for the said Court, with the approbation of the said Governor or President and Council, for the time being, or the major part of them, and also to and for the Court of Directors of the said United Company, or any Thirteen or more of them, to vary and alter such Table of Fees, in such manner as they shall think fit".

The Charter dated 26th December, 1800, establishing a Supreme Court of Judicature at Madras, after empowering the Court by Cl. 19 "to appoint so many and such clerks, Registrars, Proctors and other Ministerial officers, as shall be found necessary for the administration of justice, and the due execution of all the powers and authorities which are and shall be granted and committed to the said Court, by these our Letters Patent" proceeded thus in Cl. 20:

"And we do hereby further authorise and empower the said Supreme Court of Judicature at Madras to settle a table of the fees to be allowed to such Sheriff, Attorneys, and all other clerks and other officers aforesaid, for all and every part of the business to be done by them respectively, which fees, when approved by the said Governor of Fort St. George, in Council (to whom we hereby give authority to review the same) the said Sheriff, Attorneys, clerks and other officers shall and may lawfully demand and receive. And We do further authorise the said Supreme Court of Judicature at Madras, with the like concurrence of the said Governor in Council from time to time, to vary the said Table of Fees, as there shall be occasion . . . . And We further direct and appoint that the said Table, and the said alteration and variations thereof . . . . shall be hung up in some conspicuous part of the hall, or place where the Supreme Court of Judicature shall be publicly holden".

Apparently, in those days, there was possibly an apprehension that the Judges may not be above receiving fees for their services to litigants, for, the Charter, after prescribing a salary of £.6,000 per annum for the Chief Justice and £.5,000 for each of the two Puisne Judges, proceeded to say in Cl. 13:

"And we do hereby ordain, appoint and declare, that the said salaries shall be in lieu of all fees of office, perquisites, emoluments and advantages whatsoever, and that no fees of office, perquisites, emoluments and advantages whatsoever, other than and except the said salaries, shall be accepted, received, or taken by such Chief Justice or the Puisne Justices, in any manner or on any account or pretence whatsoever".

Now the idea of levying fees from litigants may be based on any of the following reasons: (1) That it is desirable to check vexatious litigation; (2) That the administration of justice should pay its way and that the general taxpayer should not be called upon to subsidise the private quarrels of individuals; or (3) That

it should be considered as a source of revenue to the State just like income-tax or succession duty. The third seems to be the reason for its levy in India at the present day. Even the Courts may be said to have recognised that that is the basis on which court-fee is levied in India at present, by their applying the principles governing the interpretation of fiscal enactments to the construction of the provisions of the Act.

The second reason given above is probably the basis of payment by "fees" to the "clerks and officers" of the Court as set forth in the extracts above. Properly applied, it is probably the most equitable basis; but it was because it was not properly applied and proved highly oppressive to the litigant public that in the second and third quarters of the last century, mainly as the result of an all-round attempt at improvement of judicial administration initiated by Bentham and other reformers, that a change-over was effected from payment by "fees" to payment of fixed salaries by the State to the officers.

How did it happen that the principle of payment by fees on the basis of services rendered, good in theory, came to be so oppressive and had to be given up? Professor Holdsworth has traced the origin and history of the official staffs of the Central Courts in England. According to him:

"The feudal system was both a system of land tenure and a system of Government. The lord from whom the land was held by his tenants had powers of Government over those tenants. The conception of tenure was applied not only to the land, but also to many other things, connected with the land; and, among those other things, to the Governmental rights, which either went with the tenure of land, or were annexed to it by usurpation or royal grant. The creation of these rights was one method of getting Governmental functions performed; and so, when kings or other rulers wished to get these functions, Governmental or otherwise, performed, they had recourse to this expedient. They did not make a contract with a person to perform these functions; they granted him a right to perform these functions on certain terms. Thus the office held by such an official was regarded as a piece of property which gave the official certain rights and placed him under certain duties, just as the tenure of a piece of land gave the tenant certain rights and placed him under certain duties." (Holdsworth's History of English Law, Vol. I, p. 241).

With the destruction of the feudal system and the successful consolidation of the institutions of the English Central Government, those institutions came "to be staffed by officials whose offices had been granted to them to have and to hold in fee, in tail or for life, in return for fees to be collected by them for doing the duties attached to those offices" (*ibid* p. 249). The right to collect such fees was looked upon as a species of property for which the candidates were willing to pay a handsome sum; favourites also may be rewarded by such grants. With the development of

the idea of property in the office, the question of the qualification of the grantee to perform the duties attached to the particular office became a secondary factor, and he could delegate his functions to another and allow him to retain a fraction of the fees received, and pay over the balance to him. The delegate himself may, in his turn delegate to another, and so on almost *ad infinitum*. By this process of delegation, in course of time there came into existence a set of officials having absolute sinecures. A glaring instance of such a sinecure was the office of "The Chief Clerk of the Court of King's Bench." As Professor Holdsworth says:

"No doubt, the Chief Clerk once had duties to perform; but long before the 19th century, these duties had been delegated to other officers who had acquired separate and independent positions of their own."

In the Report of the Commissioners upon saleable offices in the Courts of Common Law presented to Parliament in 1810, the total income of this sinecure office was shown as £. 6,280-18-6 per annum out of which, the holder paid to his deputy (who actually performed the duties) £. 200. Another sinecure office was called, "The Clerk of the Errors in the Exchequer Chamber" and the holder of the office paid his deputy £. 125, out of a total income of £. 2,333-16-7 per annum. There were many other similar instances both on the Common Law Side as well as in Chancery—only in Chancery with its Six Masters and its Six Clerks and innumerable other officers it was much worse. The income of all these sinecures, deputies, sub-deputies, etc., had to come from fees paid by suitors in connection with the very numerous acts that must be done to set and keep in motion the complicated machinery of the Courts from the issue of the original writ to the execution of the final judgment. It is no wonder that, in order to enhance their earnings, these officials multiplied the processes which judicial actions had to go through before an aggrieved person could get his rights—if he lived long enough to do so. Dickens has given a graphic picture of the progress of a Chancery action in his "Bleak House" thus:

"At the beginning of the 19th century, there was a regular hierarchy of officials. At the top there were the dignified officials who took large sums for doing nothing, and at the bottom there were the poorly paid clerks who did the work." (Holdsworth's History of English Law, Vol. I, p. 257).

The abuses of the system formed the subject of innumerable inquiries; but the vested interests were so powerful and had become so deeply entrenched that nothing could be done for a long time. Finally, a series of damaging reports by Special Commissioners issued between 1818 and 1822 threw such a lurid light upon the whole system, that reforms had to be undertaken; but, as is usual with English Parliamentary legislation, the evil was not tackled as a comprehensive whole. A series of special Acts dealing

with particular offices were passed at fairly long intervals. "The result of these changes was that at the time of the passing of the Judicature Acts (*i.e.*, 1873) there were two chief classes of officials attached to the Common Law Courts. They were the Masters and the Associates. Each of them possessed a staff of clerks. All officials were paid by fixed salary." (Holdsworth's History of English Law, Vol. I, p. 263).

In India, the evil did not attain anything like the proportions which it attained in England. But the reforming zeal in England in the second and third quarters of the 19th century had its reaction in India also. As mentioned earlier, the Charter of the Supreme Court issued in 1800 had empowered it to settle a table of fees to be allowed to the sheriff, attorneys, clerks and officers of the Court. Similar provisions existed in the Charters of the other Supreme Courts—those of Calcutta and Bombay. In 1835, in response to the directions of the Court of Directors, the Supreme Courts submitted returns showing the incomes of their several officers. The following facts culled from the return submitted by the Supreme Court of Madras reveal an interesting state of affairs. The salary of the Master (one Mr. J. Savage) was Rs. 525, *per mensem.* In addition to his salary, the said gentleman received as "fees" Rs. 30,463-5-4 in 1829, Rs. 31,875-10-8 in 1830, Rs. 39,699-13-9 in 1831, Rs. 36,625-11-2 in 1832 and Rs. 38,498-0-3 in 1833. The same gentleman held also the office of the Common Assignee of the Court for the relief of Insolvent Debtors, and in that capacity received every year a substantial sum by way of commission and office allowances. The Registrar and Prothonotary (one Mr. P. Cator) received no salary, but his net income in the shape of fees and emoluments was really enviable. His return showed a net income of Rs. 48,613-6-5 for 1829, Rs. 43,158-12-4 for 1830 and Rs. 65,773-11-11 for 1831. High as these appear to be, in Calcutta the officers seem to have done even better. The net average annual value of the Ecclesiastical and Admiralty Registrar's office of the Calcutta Supreme Court was Rs. 89,037-0-0; that of the Equity Registrar Rs. 52,786-0-0; and that of the Taxing Officer Rs. 22,245-15-0. In their Report, the Judges of the Supreme Court of Madras observed, that:

"Fixed salaries payable by the Government, accompanied with an adequate number of writers, and a due allowance for stationery and office establishments, would be a preferable mode of remuneration to that which at present exists; the whole of the fees in such case accounted for to the Government. This system we believe, is adopted throughout the Company's Courts, and we are not aware of any practical inconvenience which would arise from it in the Supreme Court".

The remuneration proposed by the learned Judges of the Calcutta Supreme Court for their several officers as

a final arrangement worked out as follows:—

Master, Accountant-General, Examiner in Equity and Examiner in Insolvent Court (all to be held by one person) Rs. 54,000 per annum.

Ecclesiastical, Equity and Admiralty Registrar, and Sworn Clerk (all to be held by one person) Rs. 54,000 „

Prothonotary, Clerk of the Crown, Clerk of the Papers and Sealer (all to be held by one person) Rs. 36,000 „

Taxing Officer, Receiver, Record Keeper and Chief Clerk of the Insolvent Court (all to be held by one person) Rs. 36,000 „

So strong was the influence of the vested interests, however, that the Judges observe:

"We think it right, and we are convinced that the Government would wish, that in any plan proposed for adoption, the interests of the present holders of office should be treated with the utmost respect."

After a great deal of correspondence, the present system of payment by fixed salaries to officers and of appropriating to the Government the fees paid by suitors was adopted.

These constitute the background and furnish the explanation for the curious words occurring in S. 3 of the Court-Fees Act. The kernel has been extracted, but the empty shell is kept intact as a relic of things of bygone days.

BOOK REVIEW.

"INDIAN COMPANY LAW," by M. J. Sethna, Barrister-at-Law, 2nd edition, 1941: Published by the author at 251, Tardeo Road, Bombay.

Company Law is a growing subject, and the Act of 1936 has made many changes in the law as enacted in 1913. The book under review contains the law as amended upto July, 1941. Though originally intended as a students' handbook, the present edition has been so enlarged as to become a practitioner's book and a lucid commentary on the Act. In the first portion of the book the author has dealt with the subject of Company Law in a logical manner, taking topic after topic and weaving them into a coherent and whole life-history of a company. Each fasciculus of sections of the Act bearing upon a topic has been analysed in the author's own language and the matter is elucidated by reference to relevant case-law, both English and Indian. In a short critical introduction the author has discussed how far the amending Act of 1936 is an improvement on that of 1913 in protecting the interests of share-holders and members of companies and third parties dealing with them. A special chapter has been devoted to the Insurance Act of 1938 as amended and the newly added

chapter on Income-tax and Super-tax with reference to registered companies will be found very useful by layman and lawyer alike. The several appendices to the book add to its utility as a practical *vade mecum* to the business man, the company promoter, the student of Company Law, and generally to all interested in company matters. The author deserves to be congratulated for bringing out this highly useful work.

THE CIVIL RULES OF PRACTICE AND CIRCULAR ORDERS issued by the High Court of Judicature at Madras for the guidance of Subordinate Civil Courts in the Presidency: Published by authority. Second edition (in 2 volumes).

This publication supplies a long-felt want. An authorised compilation of the Rules, Circular Orders and Instructions commands and enjoys a prestige and value of its own and the issue of revised editions periodically will certainly be a desirable step. The Rules implementing as they do the various statutory provisions are no doubt important, but more interesting are the Circular Orders setting out the practical rules framed as the result of intimate experience with the day to day working of the subordinate Courts and designed to ensure speedy administration of justice. They cover a variety of subjects like sittings of Courts, language of civil Courts, granting of adjournments, summons to defendants and witnesses, service of processes of and through foreign Courts in India, service of processes in countries outside India, death and array of parties, pleadings and matters connected with trials, commissions, judgments and decrees etc.

The first volume contains all the Rules and the more important Orders and Instructions regulating the practice and procedure of the subordinate Courts. It is laid in two parts. While Part I sets out the Rules made under the Civil Procedure Code by the High Court and the Circular Orders relating thereto, Part II gives the Rules issued by the High Court and the Local Government under several special enactments like the Court-Fees Act, the Provincial Insolvency Act, the Partition Act, the Guardians and Wards Act, the Indian Succession Act, the Administrator-General's Act, the Indian Divorce Act, the Indian Soldiers (Litigation) Act, the Indian Bar Councils Act, the Legal Practitioners Act, the Destruction of Records Act, the Madras Village Courts Act and the Madras Agriculturists' Relief Act. The relevant Circular Orders and Instructions are given at the appropriate places. Volume 2 deals mainly with matters relating to the administration of Courts and office routine and practice.

One remark that might be made is that in a publication of 1941 it should have been possible to accommodate the Rules and

Orders issued subsequent to the end of March, 1940 down to the commencement at least of this year. In the case of the first edition it was in fact stated that it had been brought up-to-date. Another point to attract criticism will be the note "all rights reserved". It is a matter for doubt whether apart from the Circular Orders and Instructions any copyright attaches to the Rules themselves. The English practice is that in the case of rules the Crown does not ordinarily assert any such claim. Further under S. 18 of the Copyright Act the copyright, if any, can attach in regard to rules only for 50 years from the date of their first promulgation.

The book is priced, Rs. 6. It is essential for every day practice. It makes interesting reading. It may be said that there is almost a duty cast on active practitioners to equip themselves with this authoritative publication.

THE INDIAN CONVEYANCER by Rai Bahadur P. C. Mogha, second edition: Published by Eastern Law House, Ltd., Ganesh Chunder Avenue, Calcutta, 1941, Price Rs. 10.

A book on conveyancing with specimen forms and instructions to understand and adapt them according to the special facts of each case will be an invaluable asset not merely to lawyers but also to laymen, particularly in this country where the importance of conveyancing as an art is just becoming increasingly realised. That copies of the first edition were sold out within a year of its publication and that Mr. Mogha's credentials to write authoritatively on this subject are high in view of his having been Government Conveyancer, U. P., are facts vouching for the value of the work. The general principles of conveyancing are set out in the Introduction. The Precedents are arranged in groups according to subjects and alphabetically. Short notes so far as may be necessary for conveyancing purposes are appended to the precedents relating to the different subjects. The Stamp and Registration laws are also referred to. It may be pointed out that the preliminary notes given are at times not in a pointed form. For instance, to state with reference to a Hindu widow's power of adoption in Bombay, "if her husband had died as a co-parcener 'see Mulla's Hindu law, 8th edition, p. 526' (p. 36)" is not really helpful. Moreover the distinction which the context seems to imply as existing in the Maharashtra school between a case where the husband had died divided and a case where he did not no longer exists.

A great merit about Mr. Mogha's book is that the precedents steer clear of unnecessary technical expressions and bring out all the essential ingredients relating to the particular transaction.

The forms are presented in a simple and intelligible style. We have great pleasure in welcoming this publication.

THE INDIAN LIMITATION ACT (1908), by V. V. Chitaley and K. N. Annaji Rao, second edition, 1941: Published by the All India Reporter, Ltd., Nagpur, Volumes I & II.

Messrs. Chitaley and Annaji Rao are very familiar to the legal world as the authors of commentaries on the Civil Procedure Code and the Criminal Procedure Code. The plan and execution of the present work follow the lines adopted in the case of the other two publications. The first volume deals with Ss. 1 to 32 and the second with Articles 1 to 140 of the first schedule. The first volume also sets out the provisions of the Prescription Act, 1832 (2 & 3 William IV, C. 71) and the Indian Easements Act, the Statement of Objects and Reasons and the Select Committee's Report on the Indian Limitation Bill, 1908.

It is indisputable that the provisions of the Limitation Act have given rise to a vast and staggering mass of decisions, not all of which are equally reconcilable. To sift and analyse the same and get at the core of the reasoning with a view to evolve a logical, and coherent body of rules may essentially be the task of a jurist. More modest but not less helpful is the task of the writer who collates, classifies and discusses the case-law under appropriate heads indicating in case of conflicting interpretations his own preference in the matter. The authors of the present work are alive to the fact that the "hackneyed method of merely digesting cases under each section" has ceased to carry any appeal and they have attempted to present the subject comprehensively. The present edition has noticed and incorporated all the decisions reported since the previous edition three years ago. The references to official reports have no doubt been given in all cases reported there but it would have been better if references to one or two non-official reports circulating in the province concerned had also been given.

As far as we have seen it may be stated that the propositions are generally accurately and neatly expressed. We are sure that the book under review will be highly helpful to all practitioners of law.

[END OF VOLUME 1941, II.]

THE
MADRAS LAW JOURNAL

II] DECEMBER [1941

STATE OF WORK IN THE HIGH COURT.

The Registrar, Madras High Court, has sent to us the following for publication in the columns of our Journal:—

"As there appears to be some misapprehension regarding the amount of work pending disposal in the High Court and as erroneous statements have been made publicly in this connection, the following statement of the actual position is published.

The total number of cases pending in the High Court is now smaller than it has been for some years; but it is still large. On the 1st December, 1941, the cases pending were:—

358 Original suits,
55 Original petitions,
2025 Petitions under the Presidency Towns Insolvency Act,
1057 Appeals from original decrees of Mufassal Courts (First Appeals),
59 Appeals from the decrees passed on the Original Side of the High Court (Original Side Appeals),
54 Appeals from decrees of the City Civil Court,
2219 Appeals from appellate decrees of the Mufassal Courts (Second Appeals),
822 Appeals from orders of Mufassal Courts (Civil Miscellaneous Appeals),
438 Appeals from appellate orders of Mufassal Courts (Civil Miscellaneous Second Appeals),
36 Letters Patent Appeals,
2653 Civil Revision Petitions,
1630 Civil Miscellaneous Petitions,
41 Referred Trials,
166 Criminal Appeals,
62 Criminal Revision Cases, and
40 Criminal Miscellaneous Petitions.

Many of the original suits, first appeals, second appeals and civil revision petitions were filed in 1939 and some in earlier years.

The decision to take up a selected number of old second appeals and civil revision petitions for disposal without further printing was made only because the output of the printers was insufficient to keep pace with the disposals of the Judges. Steps have now been taken to increase the output of the press.

The institutions on the Appellate Side have shown a marked increase during 1941. The number of first appeals filed up to 1st December, 1941, was 490 against 332 in the first eleven months of 1940. The figures for second appeals and civil revision petitions are 1396 and 2647 respectively for the first eleven months of 1941 against 1054 and 2061 respectively for the period from 1st January, 1940 to 30th November, 1940.

(Sd.) S. P. THOMPSON,

Registrar.

High Court of Judicature,
Madras, dated 4—12—1941.

[END OF VOLUME, 1941—II.]

THE
MADRAS LAW JOURNAL.

II] JULY [1941

NOTES OF INDIAN CASES

BHAGAVANTULAYYA *v.* VENKANDHORA, (1941) 1 M.L.J. 788 (F.B.).

One of the questions raised in this case was whether the principle *de minimis non curat lex*—the law does not concern itself about trifles—can be invoked in cases of tender of an amount in redemption of a mortgage, where owing to a *bona fide* mistake in calculation on the part of the mortgagor the sum tendered falls short of the amount due by a few rupees. It was not necessary for the Full Bench to give a decision on this point and in fact the matter was left open but with the observation that "it is certainly open to doubt whether it (the maxim) can properly be applied" (p. 791). There is not much direct authority on the point, English or Indian, and such judicial dicta as refer to the question are of a conflicting kind. Among the statutes, S. 38 (2) of the Indian Contract Act lays down the principle that the offer of performance must be "of the *whole* of what he (the promisor) is bound by promise to do". S. 83 of the Transfer of Property Act which confers on a mortgagor the power to deposit in Court the money due on a mortgage requires that it should be of *"the amount remaining due on the mortgage"* and S. 84 declares that it is only on the tender or deposit in Court under S. 83 of *"the amount remaining due on the mortgage"* that there will be cessation of interest. The language of these provisions is unambiguous and suggests that *prima facie* a tender will not be good where it is not of the correct amount, irrespective of the nature of the deficiency, whether it is by a few pies or by a few rupees. This conclusion is also in consonance with the spirit of the decisions which hold that the money tendered must be in the coin of the realm, *Trimbak* v. *Sakharam*[1], and that even a payment by cheque will not be a proper tender, *Jones* v. *Arthur*[2], Re. *Quebrades Co., Clarke's case*[3], *Johnston* v. *Boyes*,[4]

1. (1891) I.L.R. 16 Bom. 599.
2. (1840) 8 Dowl. P.C. 442.
3. (1873) 42 L.J.Ch. 277.
4. (1899) 2 Ch. 73.

Venkataramier v. *Gopalakrishna*[1]. The amount tendered ought to be the *precise* amount that it is due[2]. It is true that with reference to proceedings for infringement of the revenue laws, Sir W. Scott has observed: "The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *de minimis non curat lex.* Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle which if continued in practice, would weigh little or nothing in the public interest, it might properly be overlooked[3]". As pointed out in *Joyce* v. *Metropolitan Board of Works*[4], courts of justice do not generally take trifling and immaterial matters into account except under peculiar circumstances such as the trial of a right or where personal character is involved. For the maxim to apply there must be no question of right or personal character involved; the infringement should be slight and of a prescription inflicting a penalty on violation thereof; and condonation should weigh little or nothing in the public interest. The maxim has thus been held not to apply to the law of trespass, *Somasundaram Chetty* v. *Ramiah*[5], or so as to neglect fractions in the matter of determining majority of votes at a meeting, *Lakhmidas and Co.* v. *Sir Dorab Tata*[6]. In the case of tender of amount in redemption of mortgages the mortgagee is not bound to accept anything less than the full amount that is owing to him and he cannot be damnified by any mistake made by the mortgagor in making the tender, *Gauri Shankar* v. *Abu Jafar*[7]. The smallness of the sum involved is *per se* no reason for the application of the maxim *de minimis non curat lex,* for it very frequently happens that a very small sum may involve a very big question of principle, *Kameshwar Singh* v. *Ramjiwan Sahu*[8]. As remarked by the Allahabad High Court in a case where the tender was insufficient by Rs. 2-9-6 due to miscalculation by the pleader's clerk, "the amount of insufficiency is wholly irrelevant. Whether it was Re. 1 or Rs. 100 or Rs. 1,000 makes no difference in law[9]". In Madras, while in *Subbai Goundan* v. *Palani Goundan*[10], Sadasiva Aiyar and Moore, JJ., considered that a deficiency of 9 17/31 pies due to a *bona fide* mistake on the part of a mortgagor in making a deposit under S. 83, T. P. Act would render the deposit invalid, in a later case, *Subramania Aiyar* v. *Narayanaswami Vandayar*[11], Seshagiri Aiyar, J., alluding to the earlier decision stated: "if I were deciding that case I would have applied the maxim *de mini-*

1. (1929) I.L.R. 52 Mad. 322.
2. 7 Halsbury p. 198, S. 277.
3. *The Reward,* 2 Dod. 265.
4. 44 L.T. 811.
5. (1911) 22 M.L.J. 62; *see also* Clerk and Lindsell on Torts, 4th ed. p. 343.
6. (1927) I.L.R. 51 Bom. 247.
7. (1915) 34 I.C. 690.
8. A.I.R. 1932 Pat. 237.
9. *Jag Sah* v. *Ramachandra Prasad* (1921) 63 I.C. 563.
10. (1916) 30 M.L.J. 607.
11. (1917) 34 M.L.J. 439.

mis non curat lex". This *obiter dictum* has been approved by Venkataramana Rao, J., in a case where on the question whether a deposit under S. 83 of the T. P. Act, of Rs. 2,144-12-4 instead of the correct amount Rs. 2,144-12-10 due to a mistake in calculation will render the deposit invalid, he held that the *de minimis* rule will apply and the deficiency can be cured[1]. It is submitted that these cases really stand outside the scope of the maxim that the law will not concern itself about trifles. In these cases no mere irregularity in procedure arises nor any question of the infringement of a prescription enjoined in the public interest carrying a penalty on violation thereof, admitting a relaxation of the letter of the law where such relaxation will not affect the public interest in any appreciable degree. They are, on the other hand, cases involving private rights and obligations where the letter of the law has to rule, there being no ambiguity in the language of the statutory provisions concerned.

MIR GHULAM HUSSAIN SAHIB *v.* AYESHA BIBI, (1941) 1 M.L.J. 800 (F.B.).

This Full Bench decision holds that where a Judge certifies under Cl. 15 of the Letters Patent that a case "is a fit one for appeal," it is no function of the learned Judge to say what points are fit for appeal and that it is really for the higher appellate Court to say what are the questions it will allow to be raised. Clause 15 of the Letters Patent (Madras) merely states that an appeal shall lie from a judgment of any Division Court on second appeal "where the Judge who passed the judgment declares that "the case is a fit one for appeal." There is nothing in Cl. 15 to suggest that in granting leave the learned Judge can limit the points on which the appeal can be taken, nor is there anything prohibiting him from doing so. In fact the scope of a Letters Patent appeal has always been the subject of a conflict of judicial opinion. While some decisions take the view that in any event points not raised during the hearing of the second appeal cannot be argued in Letters Patent appeal, *Shahazadee Hazra Begum* v. *Khaja Hossein Ali Khan*[2], *Aiyanars* and *Kaniyala Swamigal Koil Devasthanam* v. *Periyakaruppa Thevan*[3], *Kapildeo Bhagwan* v. *Ali Raza*[4], there are other decisions holding that the whole matter is open, see *Shaik Mahamad Ravuthar* v. *B. I. S. N. Co.*[5] In England, it has been held by the Court of Appeal more than once that it has no jurisdiction in appeals from judgments of Division Benches of the High Court passed in the exercise of their appellate jurisdiction to hear such appeals except on the points on which leave to appeal has been given by the Divisional Courts,

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1. *Narayanaswami Nayak* v. *Ramaswami Nayak*, (1939) 1 M.L.J. 324.
2. (1869) 12 W. R. 498. 3. (1929) 30 L.W. 583.
4. (1940) I.L.R. 19 Pat. 104, *see also* I.L.R. 20 All. 258, A.I.R. 1923 Lah. 151, etc.
5. (1908) I.L.R. 32 Mad. 95, *see also* 20 C.W.N. 210, etc.

where leave has been so limited, *Jones* v. *Biernstein*[1], *Sanderson* v. *Blyth*[2]. A similar view has been taken by the Judicial Committee as to the scope of appeals to that body by special leave. Thus in *Brownlee* v. *Macmillan*[3], where an appeal was carried to the Privy Council by special leave, their Lordships declined to hear counsel on points not forming the subject of consideration in granting special leave. Lord Thankerton observed: "When special leave to appeal was granted there was no intention on the part of their Lordships who heard the application to permit argument on any point except the effect of S. 5 of the Seduction Act." The cases of special leave may stand on a different footing altogether and the nearest English analogy is that afforded by the jurisdiction exercised by the Court of Appeal in appeals from a Division Bench of the High Court exercising appellate jurisdiction. In India, on the question whether the Judge granting a certificate under Cl. 15 of the Letters Patent can limit the points open to argument in the Letters Patent appeal, conflicting tendencies are visible. In *Buthiraju* v. *Satyanarayanamurti*[4], Ananthakrishna Aiyar, J., held that the Judge giving leave to appeal from his judgment in second appeal may limit it to certain points only and in such cases the appellant will be confined to such points. In *Dass* v. *Lakhajee*[5], the Rangoon High Court has however adopted a wider view of the powers of the Bench hearing the Letters Patent appeal, namely, that the Bench will not be precluded from going into points other than those raised in the certificate. The instant decision puts the matter slightly differently in laying down that the Judge granting the certificate cannot limit in any way the points that can be raised in appeal and incidentally disapproves the view taken in *Buthiraju's case*[4].

In the matter of the Hindu Women's Rights to Property Act, 1937, (1941) 2 M.L.J. 12 (F.C.).

"A legislative measure . . . . . is intended to be administered rather than litigated upon," said Lord Wright in *Harris* v. *Associated Portland Cement Manufacturers*[6]. That this is only a counsel of perfection is nowhere more forcibly illustrated than in the case of the Hindu Women's Rights to Property Act (18 of 1937). Where previously there was a measure of uniformity there has now been introduced an element of diversity in the law applicable to the rights of succession of Hindu widows, by reason of the Opinion of the Federal Court in regard to that Act. The right of succession of Hindu widows will hereafter depend not merely on the character of the property left by the deceased, agricultural or non-agricultural, but also upon its *situs*, whether it is within

1. (1900) 1 Q.B. 100 (C.A.). 2. (1903) 2 K.B. 540 (C.A.).
3. (1940) A.C. 802 (P.C.).
4. (1930) I.L.R. 53 Mad. 406. 5. (1940) Ran.L.R. 693.
6. (1939) A.C. 89.

a Governor's Province or elsewhere in British India. How her rights of succession will react on her right to maintenance in the Governors' Provinces where a person dies leaving agricultural land as well as other property is likely to be hereafter a fruitful field of litigation.

In so far as the opinion under notice holds that the Act governs cases of devolution by survivorship also, the position is supported by authority. Though there is a difference between the rule of survivorship applicable to co-parcenary property and the rule of inheritance governing separate property, there can however be no doubt that both of them are really rules of succession. In the *Sivaganga case*[1], the Privy Council has observed: "there are two principles on which the rule of succession according to Hindu law appears to depend; the first is that which determines the right to offer the funeral oblations and the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased; the other is an assumed right of survivorship". Again in the *Gangur case*[2], the Privy Council has remarked that the *Sivaganga case*[1], which was the foundation of the distinction between the rule of survivorship applicable to joint family property and the rule of inheritance applicable to the self-acquired or separate property of a person was authority "to support the proposition that, whether the general status of the family be joint or divided, *property which is joint will follow one and property which is separate will follow another course of succession*".

In so far however as the Opinion under notice holds that Act 18 of 1937 legislates in respect of succession to property other than agricultural land alone and that the word "property" as used in the Act should be so understood, the position is open to criticism and some of the lines of reasoning adopted by the Court fail to carry conviction. It is conceded that the Act purports to deal in quite general terms with the property of a Hindu and does not distinguish between agricultural land and other forms of property (pp. 21, 22). It is also recognised that "it may well be that the Indian Legislature if it had been able to pass the Act while it still possessed plenary powers would have desired that the better rights which it sought to give to Hindu women should extend to agricultural land as well as other property (p. 28). But it is said that because when the Act finally emerged from the second Chamber of the Legislature and received the assent of the Governor-General the powers of the Legislature became restricted it should be understood as referring only to those forms of property with respect to which the Legislature was competent to legislate, that is to say, property other than agricultural land. Even assuming the prin-

1. *Katamma Nachiar v. Vijaya Raghunatha,* (1863) 9 Moo.I.A. 539, 614.
2. *Chowdhry Chintamun Singh v. Mt. Nowlukho Kunwari,* (1875) L.R. 2 I.A. 263, 271.

ciple contained in the first part of the statement to be correct the conclusion contained at the end will not follow, for on the 14th April, 1937, the Central Legislature was certainly competent to legislate for all forms of property in certain parts of British India, namely, the Chief Commissioners' Provinces, see Ss. 100 (4), 46 and 94 of the Government of India Act, 1935. The test propounded by the Federal Court if strictly applied will mean that the term 'property' as used in the Act 18 of 1937 will cover all kinds of property in some places in British India and property other than agricultural land in other places, a position that will attribute to the Legislature an intention that the same term should mean different things in different localities.

It is true that there is a presumption that a Legislature does not intend to exceed its jurisdiction. It may be equally true that the intention of the Legislature should be ascertained in the light of its powers on the date when the Bill becomes law. The latter principle obviously cannot apply to a case like the present which is altogether anomalous. The rule may govern where the Legislature consisted of a single Chamber and its powers were curtailed before the Bill became law, whether such curtailment took place before the Bill was passed by the Chamber or not; the rule may equally apply where the Legislature consisted of more than one Chamber and its powers were cut down either after the Bill had been passed by both the Houses or before either of them had passed it. In the case of the Hindu Women's Rights to Property Bill, the intention of the Assembly which possessed plenary powers while it passed the Bill can in no sense be the same as that of the Council of State whose powers at the time of passing the Bill had been cut down. To attribute to both the Houses an identical intent in such circumstances by the application of the doctrine that the intention of the Legislature should be deduced in the light of the powers it had on the date when the measure became law is, with great respect, to carry fiction to illogical limits. In fact in a case like the present the appropriate course would have been to ask the Assembly to reconsider the measure as passed by the other House so as to secure its consent to the amendments to the scope of the original measure effected by operation of law consequent upon the restriction of the powers of the Central Legislature due to the coming into force of Part III of the Government of India Act, 1935, and the passing of the Bill by the Second Chamber under its curtailed powers. The test propounded by their Lordships will lead to startling results, if applied in similar circumstances, to a converse case. If at the time the Assembly passed the Bill it had power to deal with non-agricultural property only but by the time the measure was passed by the other House the Legislature acquired power to deal with all forms of property, can it be said that by the use of the term 'property' generally in the Bill both the Houses must be deemed to have legislated in regard to all kinds of property by the application of the doctrine that the intention

of the Legislature should be gathered from the powers it had on the date when the Bill became law?

The statement, that the Indian Legislature which was in existence immediately before the coming into force of Part III of the Government of India Act, 1935, was continued in existence after that date and was *in all respects* the same Legislature, is equally open to challenge. Burma had been separated from British India; the powers of the Central Legislature had been curtailed; its personnel had become reduced; and its territorial jurisdiction had become abridged. Under S. 2 of the Government of India Act, 1935, there was also a resumption of all powers, authorities and jurisdiction by the Crown. The Act of 1919 under which the Central Legislature had been constituted had been repealed. No doubt by virtue of S. 317 and the Ninth Schedule to the Act of 1935 such part of the Central Legislature as remained after the secession of Burma was to exercise with reference to British India the functions of the Federal Legislature during the transitional period pending the advent of Federation. Do not these factors and provisions suggest that the old Legislature had perished in the first instance and had been resurrected or recreated with different powers and territorial jurisdiction? The analogy of the effect of a resumption of an inam by Government and an immediate regrant of it to the very individual who had held it all along, as extinguishing the old tenure and as vesting the grantee with an altogether fresh title to the property, strengthens such an inference. Nor has the Federal Court considered the necessity for and the implications of such provisions as S. 292 of the Act of 1935 providing for the continuance of the existing laws, and S. 9 (1) of the Government of India (Commencement and Transitory Provisions) Order 1936 and S. 1 of the India and Burma Existing Laws Act, dealing with laws already passed but intended to take effect at a future date which might well be after the commencement of Part III of the Act of 1935. In fact the considerations bearing on the validity of the Hindu Women's Rights to Property Act mentioned in the columns of this Journal [(1940) 2 M.L.J. 63 Jour.] still remain true. In these circumstances one would wish that the Federal Court had also considered the arguments advanced on the footing that property as used in the Act covered all kinds of property and on the applicability of the doctrine of severability upon such a construction.

RAMANNA *v.* JAGANNADHA RAO, (1941) 2 M.L.J. 58 (P.C.).

The Privy Council has in this case held that coparceners who intend to remain joint do not become divided because for purposes of pretence they refer to their interests in particular properties by fractional shares. This is but a reiteration of the doctrine that

partition is the result of intention. A statement of their Lordships in *Appovier* v. *Ramasubba Aiyan*[1], had however given rise to some difficulty. The Privy Council had in that case observed: "When the members of an undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share which he may claim the right to receive and to enjoy in severalty". This statement can hardly afford scope for the contention that separation of status will result even where the agreement is sham or a mere pretence. It is not the recital but the actings and dealings with the estate which furnish a true guide to the determination of the question of jointness or otherwise, *Harkishan Singh* v. *Partap Singh*[2]. There must be clear proof that the parties *intended* that the agreement must take effect immediately, it is only then that there will be a separation in status, *Purnananthachi* v. *Gopalaswami Odayar*[3]. Where a decree was passed by consent of parties that the sons of a person by his first wife were to have a half share and his sons by his second wife including those that might be born thereafter were to have the other half, it was held that in the circumstances the decree effected no severance in status but merely embodied an arrangement to be carried into effect if and when a partition was decided upon, *Chockalingam Chettiar* v. *Muthukaruppa Chettiar*[4]. So where there is no genuine intention or *animo contrahendi* that the agreement is to effect a separation in *praesenti* a mere reference in a document by the coparceners to their fractional shares in particular properties will not extinguish their joint status.

Another question raised before the Privy Council, which if answered would have set at rest a conflict of judicial opinion on the point, as pointed out in (1941) 1 M.L.J. 14 at p. 18 N.I.C., was whether an alienation by a coparcener of his interest in the family properties would in any degree have affected his status in the family *vis a vis* the other members thereof. Their Lordships did not find it necessary to examine the contention and thus the matter still remains unsettled.

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1. (1866) 11 Moo.I.A. 75.
2. (1938) 2 M.L.J. 234 (P.C.).
3. (1936) 71 M.L.J. 554.
4. (1938) 2 M.L.J. 756.

KHANDERAO SHIVAJIRAO GAEKWAR *v.* ROMER, I.L.R. (1941) Bom. 55.

This case decides a point which should frequently come up in practice though there are not many decisions concerning the same. The question was whether the purchaser of the last out of several parcels of land into which an area had been divided, such parcel being also the lot of the greatest value, has the right to the possession of the title-deeds relating to the entire land as against his vendor who had sold the other parcels or lots to various other persons on earlier occasions and had covenanted with them individually to produce the title-deeds for their inspection whenever needed. It is well settled that title-deeds pass with the conveyance as incidental to ownership or as accessory to the estate without being named, *Lord Buckhurst* v. *Fenner*[1], *Tinniswood* v. *Pattison*[2], *Austin* v. *Croome*[3] *Rogers* v. *Hosegood*[4]. The right to the documents runs with the land, In re *Williams and Duchess of Newcastle's Contract*[5]; see also *Shri Bhawani* v. *Devrao*[6]. There is cast on the seller a duty to deliver to the purchaser all the deeds relating to the property conveyed including the documents in his power though not in his possession, Re *Duthy & Jesson*[7]. To these rules two exceptions are postulated. The first is where the vendor has retained a part of the property covered by the deeds, see *Yea Bart* v. *Field*[8]; *cf.* S. 45 (9), Law of Property Act, 1925. The second is when the property is sold in different lots, in which case the purchaser of the lot of greatest value will be entitled to the deeds. This right may however be excluded by a contract to the contrary. There can thus be a stipulation that the purchaser of the largest lot, *i.e.*, the lot of the largest area shall be entitled to the deeds, per *Sir W. Page Wood, V.C.*, in *Griffiths* v. *Hatchard*[9]. The Indian law runs on the same lines and is contained in S. 55 (3) of the Transfer of Property Act. The rule in that section takes its source from the Vendor and Purchaser Act, 1874, 37 & 38 Vic., c. 78., S. 2 and the Conveyance Act, 1881, 44 & 45 Vic., c. 41., S. 9. The first proviso to S. 55 (3) of the Transfer of Property Act corresponds to r. 5 in S. 2 of the Vendor and Purchaser Act, 1874, while the second proviso is drawn from Sugden's Vendor and Purchaser p. 434. S. 55 (3) of the Transfer of Property Act does not cover the cases where the sales of the several lots are at materially different times or where all the lots fetch an even value. According to English law, in the former case the last purchaser will be entitled to the title-deeds, In re *Lowe*: *Capel* v. *Lowe*[10]. It is

1. (1572) 1 Co. Rep. 1: 76 E.R. 1.
2. 3 C.B. 243.
3. (1842) Car. & M. 653: 174 E.R. 675.
4. (1900) 2 Ch. 388.
5. (1897) 2 Ch. 144 at 148.
6. (1887) I.L.R. 11 Bom. 485.
7. (1898) Ch. 419.
8. 2 T.R. 758.
9. (1854) 1 K. & J. 17: 69 E.R. 350.
10. (1901) 36 L.J. 73.

not clear whether that principle will rule even where the last lot is not the lot of the highest value. At any rate, in India, there seems to be no room for doubt. Having regard to the language of S. 55 (3), proviso (*b*) it is "the highest value" rule that must govern even where the lots are sold at different times. As regards the case where all the lots or parcels fetch an even value, the highest value test being futile, it is submitted that the other principle will operate, namely, that the last of the purchasers will be entitled to the possession of the title-deeds. This will be so even where the lots fetching equal prices are sold at the same time. For theory apart, in such cases there must as a matter of fact be some little interval of time separating the several transactions in view of the impossibility of achieving absolute synchrony in practice.

Regarding the effect of the personal covenants given by the vendor to the earlier purchasers in the instant decision on the operation of the aforesaid rules, the spirit as well as the letter of S. 55 (3) of the Transfer of Property Act suggest that their existence cannot be used as a lever for negativing the right of the vendee of the last lot which was also the lot of the highest value to the possession of the title-deeds, but that such vendee shall be entitled to the deeds only if he was prepared to shoulder the obligation of his vendor to the other purchasers in this respect. The Bombay High Court in arriving at that conclusion has also stated that the covenant given by the vendor to the earlier purchasers in regard to the title-deeds, may on the sale of the last lot be regarded as a covenant running with the land and as such binding on the last vendee who will thus become entitled to the title-deeds only subject to his being prepared to covenant with his vendor to produce the deeds and indemnify him against his liability to produce the same under the covenants found in the earlier sale-deeds.

KHIMJI KUVERJI SHAH *v.* LALJI KARAMSEY RAGHAVJI, I.L.R. (1941) Bom. 211.

This case decides the interesting question, probably for the first time directly, whether an action for damages for breach of promise of marriage will lie at the instance of a girl who being a minor at the time of the contract of betrothal was not a direct party to it. Contracts of betrothal may take several forms: (1) Where the intended bride and the intended bridegroom being both majors are parties directly to the contract. In such a case there can be no dispute that on breach thereof the innocent party can sue the party in breach for damages, the matter lying almost

entirely in the domain of contract law. (2) Where the proposed bride as well as the proposed bridegroom are both minors and the contract of betrothal is arranged by their respective guardians. Cases of this type are *Purushotamdas Tribhovandas* v. *Purushotamdas Mangaldas*[1], *Balubhai Hiralal* v. *Nanabhai Bhagubhai*[2] and *Kandaswami Naidu* v. *Kanniah Naidu.*[3] (3) Where the proposed bridegroom is a major and is a party to the contract of betrothal or has subsequently adopted or ratified the same, the proposed bride being however a minor. Contracts of this class are found in *Umed Kika* v. *Nagindas Narotamdas*[4], *Mulji Thakersey* v. *Gomti*[5], *Khimji* v. *Narsi*[6] and *Venkata Narasimha* v. *Govinda Krishna,*[7] and (4) where the proposed bridegroom is an adult but is not a party to the contract of betrothal the same having been arranged by the head of the family with the guardian of the proposed bride. In cases 2, 3 and 4 the question of damages on breach of the contract of betrothal has exhibited a tendency to come to the fore. In all these cases the principles of personal law applicable to the parties have cut into the law of contract and the extent to which the former will have to be accommodated into the latter has been the subject of judicial discussion. Action for damages has in some cases been brought by the proposed bridegroom, on the girl either refusing to marry him or on her being married to some one else by her parents or guardian, see *Umed Kika* v. *Nagindas Narotamdas*[4], *Mulji Thakersey* v. *Gomti*[5], *Purushotamdas Tribhovandas* v. *Purushotamdas Mangaldas*[1], *Khimji* v. *Narsi*[6] and *Balubhai Hiralal* v. *Nanabhai Bhagubhai*[2]. In some other cases the action has been by the girl (*e.g.*, the instant decision). In yet other cases the action for damages has been brought by the guardian of one of the parties as against the guardian of the other party. It has been suggested that where the contract of betrothal is not directly between the parties to the proposed marriage by reason of the minority of one or both of them the contract will be void if regarded as one by the minor or minors and will be unenforceable if regarded as a contract by the parents or guardians and that the minor or minors cannot sue on it being a stranger or strangers to the contract. The English common law rule enunciated in *Tweddle* v. *Atkinson*[8] that a stranger to the contract cannot sue upon it is however subject to certain well-recognised exceptions, one being in favour of a *cestui que trust,* while another exception is in the case of a contract by a guardian in favour of a

1. (1896) I.L.R. 21 Bom. 23.
2. (1919) I.L.R. 44 Bom. 446.
3. (1923) 46 M.L.J. 366
4. (1870) 7 Bom.H.C. O.C.J. 122.
5. (1887) I.L.R. 11 Bom. 412.
6. (1914) I.L.R. 39 Bom. 682.
7. 1937 M.W.N. 1274.
8. (1861) 1 B. & S. 393: 121 E.R. 762.

minor, *National Petroleum Co., Ltd.*, v. *Popatlal*[1]. To fit in a contract of betrothal into the latter category will not be warranted. It is debatable to predicate that it is for the benefit of the minor. Benefit will be essentially a question of fact dependent on circumstances that emerge posterior to the contract. Further a contract imposing a personal obligation on a minor cannot bind such person. None the less in *Rose Fernandez* v. *Joseph Gonsalves*[2], the Bombay High Court considered a contract of betrothal in India made by the parents or guardians of the parties to the proposed marriage as yet another exception to the rule in *Tweddle* v. *Atkinson*[3] and held that the girl who was a minor at the time of the contract of betrothal can on breach of it by the proposed bridegroom who had been a direct contracting party sue him for damages. The instant decision holds the principle to be equally applicable to Hindus also. The special facts of Indian life, the policy of the Hindu law and the authority afforded by the Shastras afford a pointer in that direction. Marriage for a Hindu male is practically compulsory, a *vyavasthitha vikalpa* and not *aicheehika vikalpa*, see *Kameswara Sastri* v. *Veeracharlu*[4]. It is obligatory on males who do not desire to adopt the life of a *naishtika* Brahmachari or of a Sanyasi, *Gopalakrishnam Razu* v. *Venkatanarasa Razu*[5], and the property of the joint family of which they are members will be bound by the expenses of their marriage, *ibid*. For a girl, marriage is the only samskara. A religious obligation lies upon her parents to provide for her so soon as she is a *matura viro*, a husband capable of procreating children, per Sir James Colvile in *Jumoona Dassya* v. *Bamasoondari Dassya*[6]. The marriage of Hindu children is really a contract made by their parents; the children themselves exercise no volition, *Dadaji Bhikaji* v. *Rukhmabai*[7], *Srinivasa* v. *Sesha*[8]. *Purushotamdas Tribhovandas* v. *Purushotamdas Mangaldas*[9]. There is no condition implicit in such a contract either that the girl should be willing to marry, see *Purushotamdas Tribhovandas* v. *Purushotamdas Mangaldas*[9], or that the boy should be willing to perform his part of the bargain, *Venkata Narasimha* v. *Govinda Krishna*[10]. Even if the proposed bridegroom was an adult at the time of the contract of betrothal, his assent to the transaction will be relevant and material only to fix him with liability for

1. (1936) 36 Bom.L.R. 610. 2. (1924) I.L.R. 48 Bom. 673.
3. (1861) 1 B. & S. 393: 121 E.R. 762.
4. (1911) 20 M.L.J. 855: I.L.R. 34 Mad. 422.
5. (1914) 23 M.L.J. 288: I.L.R. 37 Mad. 273 (F.B.).
6. (1876) L.R. 3 I.A. 72: I.L.R. 1 Cal. 289 (P.C.).
7. (1889) I.L.R. 10 Bom. 301.
8. (1918) 34 M.L.J. 282: I.L.R. 41 Mad. 197.
9. (1897) I.L.R. 21 Bom. 23, 30. 10. (1937) M.W.N. 1274

damages for breach of the contract of betrothal on his part. There are two ways in which the contract may be viewed, one in which the father may be deemed to act on behalf of his adult son as his agent in the contract, the other which according to Krishnan Pandalai, J., is the "more correct and complete view" being that the father acts not merely as the agent on behalf of the son but as the *head and representative* of the joint family of which the son is a member, *Venkata Narasimha* v. *Govinda Krishna*[1]. The contract of betrothal is in short an agreement between or on behalf of the respective families of the parties to the proposed marriage. That contracts of betrothal in India stand on a different footing from similar contracts in England, was recognised by the Privy Council when it remarked in *Khwaja Muhammad Khan* v. *Hussaini Begum*:[2] "Their Lordships desire to observe that in India and among communities circumstanced as the Muhammadans among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connection with such contracts". The facts of Hindu life coupled with the policy of the Hindu law make it clear that when parents or guardians enter into a contract of betrothal on behalf of their children or wards, there is nothing either in the nature of the thing itself or in the social practices of the parties for the supposition that they are only expressing a wish or an intention about the desirability of the marriage without intending to make themselves or them liable on a contract. Nor is there any warrant for holding such a contract to be against public policy on the ground that the parents to whom is entrusted the duty to exercise their best judgment in choosing a suitable match for their child cannot bargain away in advance the freedom of that choice or that such contract takes away the right possessed by each person to choose a husband or wife for herself or himself, *Venkata Narasimha* v. *Govinda Krishna*.[1] The contract of betrothal being thus legal and intended to give rise to legal rights and obligations, the question is who can sue on a breach of the same and when. To apply to an action for damages for breach of such contract by whomsoever brought the nomenclature, breach of promise of marriage action, may not be technically correct. In substance, it is an action for damages against the party in breach, either by the other actually contracting party or by the person on whose behalf it was entered into or by the head of the family of which the innocent party was a member. On this subject it is stated in Manu,[3]

1. (1937) M.W.N. 1274.
2 (1910) 20 M.L.J. 614: L.R. 37 I.A. 152: I.L.R. 32 All. 410, 413 (P.C.).
3. IX, 99.

एतत्तु न परे चक्रुर्नापरे जातु साधवः ।
यदन्यस्य प्रतिज्ञाय पुनरन्यस्य दीयते ॥

"neither ancients nor moderns who were good men have ever given a damsel in marriage after she has been promised to another man." The rule is somewhat differently mentioned by Yagnavalkya:[1]

सकृत्प्रदीयते कन्याहरस्तां चोरदण्डभाक् ।
दत्तामपि हरेत्पूर्वाच्छ्रेयांश्चेदूर आव्रजेत् ॥

"once is a girl given, he who takes her back is to be punished like a thief; though betrothed she may be withheld if a better qualified suitor arrives". It is only where the suitor is faultless that the father of the girl can be punished for annulling a contract of betrothal of his daughter. Narada has remarked: " when a man, after having made a solemn promise of giving his daughter in marriage to a certain suitor does not give her afterwards he shall be punished by the king like a thief in case the suitor be faultless."[2] Likewise Gautama has stated: "though he may have promised it he should not fulfil his promise if the person to whom the promise is made is tainted with unrighteousness"[3]. On the question of the heads of damages, Yagnavalkya has remarked[4]: "for detaining a damsel after affiancing her, the offender shall be fined and should also make good the expenditure with interest." The Mitakshara explains[5]: "whatever has been expended on account of the espousals by the bridegroom for the gratification of his own or the damsel's relations, must be repaid in full, with interest by the affiancer to the bridegroom. The authorities thus indicate that the party in breach can be mulcted in damages and shall be bound to return the expenses incurred by the innocent party where the breach was unjustified and that retraction will be authorised where the original suitor was unrighteous or a better suitor became available. These principles will equally govern where it is the proposed bridegroom that is at fault and the action is brought either by the girl or on her behalf, *Venkata Narasimha* v. *Govinda Krishna*[6]. Only in the latter case proof merely that the proposed bridegroom has subsequent to the betrothal married another girl will be inadequate. It should be further shown that he has refused to marry the girl betrothed to him, in view of Hindu law allowing a plurality of wives to a person. The conclusions in the instant decision that a suit for damages for breach of contract of betrothal can be maintained by the girl though she was not an actual party to the

1. I, 65.
2. XII, 32.
3. V, 23; *see also* Vasistha cited in Col. Dig. II, 174, 175 and Katyayana cited in *ibid*, 177, 178.
4. II, 147.
5. II, xi, 28.
6. (1937) M.W.N. 1274.

contract by reason of her minority and that a contract of betrothal made by parents or guardians on behalf of their children or wards will be perfectly valid so as to give rise to legal obligations are thus in accord with authority, textual as well as judicial.

JETHMAL NARANDAS *v.* MAHADEV ANANDJI, I.L.R. (1941) Bom. 156.

This case decides a point of insolvency law relating to proof of debts, under the Presidency Towns Insolvency Act. It holds that where on the hearing of a judgment-creditor's petition for adjudication, the judgment-debtor in his affidavit alleged facts which if proved will negative the existence of the debt, the decree of the Court on which the petition was founded is not conclusive proof of the existence of the debt and the Insolvency Court ought not to pass the order of adjudication without being satisfied that the debt was in fact a good debt. S. 13 (4) provides that the Insolvency Court shall dismiss the petition if it is not satisfied with the proof of the facts mentioned in sub-S. 2 or if it feels that for other sufficient cause no order ought to be made. The provision corresponds to S. 25 of the Provincial Insolvency Act and S. 7 (3) of the English Bankruptcy Act, 1883, now S. 5 (3) of the Bankruptcy Act, 1914. As Lord Esher M. R., remarked in In re *Lennox*[1], "in making a receiving order the Court is not dealing simply between the petitioning creditor and the debtor, but it is interfering with the rights of his other creditors, who, if the order is made will not be able to sue the debtor for their debts and the Court ought not to exercise this extraordinary power unless it is satisfied that there is a good debt due to the petitioning creditor". James, L.J., put it on a slightly different ground when in *Ex parte Kibble*, In re *Onslow*[2], he stated: "It is the settled rule of the Court of Bankruptcy....that the Court can inquire into the consideration for a judgment debt. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of the debtor's goods among his *just* creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends and relations without any debt being due on them at all". *Prima facie* a judgment is sufficient evidence of the existence of a debt and imports consideration. There may however be circumstances brought to the notice of the Court casting suspicion upon the genuineness of the debt. The question then will not be so much what is the right of the debtor or what the conduct of the

1. (1885) 16 Q.B.D. 315 (C.A.).
2. (1875) 10 Ch. App. Cases 373, 376.

debtor or creditor has been, but rather whether the Court ought to exercise its power and authority in those circumstances. Even where the debtor had consented to a judgment on the debt the debtor may be estopped everywhere else from saying that there was no debt due; yet no such estoppel will be effective against the Bankruptcy Court, *Ex parte Lennox*[1]. In going behind the judgment the Court of Bankruptcy does not set aside the judgment; it only "goes round" the judgment and inquires into the subject matter, In re *Fraser, Ex parte Central Bank of London*[2], see also In re *Hawkins, Ex parte Troup*[3], In re *Van Laun, Ex parte Chatterton*[4], *A Debtor*, In re,[5] *Ram Lal Tandon* v. *Kashi Charan*.[6] The Insolvency Court has power at the instance of the judgment-debtor himself to go behind the judgment and examine the reality and existence of the debt even where the debtor had previously applied in the action to set aside the judgment and his application had been refused and the refusal affirmed by the Court of Appeal, In re *Fraser, Ex parte Central Bank of London*[2]. It would thus be immaterial whether the judgment has been obtained by consent or has been confirmed on appeal. The same power can be exercised by the Insolvency Court where a judgment had been obtained by compromise, In re *Hawkins Ex parte Troup*.[3] The real test will be whether regarding the judgment as conclusive proof of the debt would cause a failure of justice, In re *Flatan*.[8] The Insolvency Court need not even decide whether the judgment debt is really due but only whether there are circumstances justifying a refusal of a receiving order, In re *Victoria*.[9] Where the passing of a receiving order would in the circumstances be unfair to the other creditors, by paralysing unjustifiably their rights or by allowing room for fraud and collusion between the debtor and his friends or where the proof of the debt is inadequate or where there is any other sufficient cause a receiving order ought not to be made. The instant decision in holding that the existence of a decree in favour of the petitioning creditor is no conclusive proof of the debt on which the petition is founded and that the judgment-debtor in spite of his consenting to the decree being passed can set up facts before the Insolvency Court casting cloud upon the existence of the debt has merely given effect to the principles of English law though there are practically no decisions of our own Courts on this point.

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1. (1885) 16 Q.B.D. 315 (C.A.).
2. (1892) 2 Q.B. 633.
3. (1895) 1 Q.B 404.
4. (1907) 2 K.B. 23, 30.
5. (1927) 2 Ch. 367.
6. (1928) 26 All.L.J. 241.
7. (1888) 22 Q.B.D. 83, 85.
8. (1894) 2 Q.B. 387.

THIRUVENGADATHA AIYANGAR *v.* SANNAPPAN SERVAI, (1941) 2 M.L.J. 307.

This case decides that all debts incurred after the commencement of the Madras Agriculturists' Relief Act, 1938, even if they be in discharge of earlier debts will fall under S. 13 only, for purposes of relief under the Act and that S. 9 cannot apply. At first blush this interpretation of the scope of S. 9 may appear to be narrow and unwarranted. The purpose of the Act is to give relief to agriculturists. The measure of relief depends essentially on whether the debt sought to be scaled down was incurred before 1-10-1932 or on or after that date. In the former case S. 8 governs; in the latter case S. 9 operates. The term 'incur' refers to the inception of the debt, *i.e.*, to the time when the original obligation was created[1]. S. 9 in terms applies to debts incurred on or after 1-10-1932 but it does not say that its provisions will be inapplicable to debts incurred after 22-3-1938. Reading S. 9 in the light of the construction placed on the term 'incurred,' it may be argued that where a liability arising before 22-3-1938 is renewed subsequent to that date, the debtor can seek relief under that section with a view to get the advantage of the proviso to sub-S. (1). Such construction will also avoid the unnecessary hardship that may otherwise result. It is indisputable that if a liability had come into existence anterior to 22-3-1938 but subsequent to 1-10-1932 the debtor can have the benefit of S. 9. To hold that he will be precluded from such benefit merely because either out of ignorance, or inadvertence or for any other reason he has renewed the liability since 22-3-1938 may appear tantamount to frustrating the beneficent object of the Act. It might be said, that renewal means merely keeping alive whatever antecedent legal liability there was and does not *per se* import an extension of that obligation, and that if in respect of the original liability the legally recoverable amount would stand controlled by S. 9, a renewal can only be of the amount so recoverable and no more. But while it is true that a debt incurred on or after 1-10-1932 falls under S. 9 it is equally true that a debt incurred after 22-3-1938 falls under S. 13. The Act has to be construed logically. Overlapping cannot have been intended and any construction tending to that result should, if possible, be avoided. While in Ss. 8 and 9 there are specific provisions introducing the theory of renewals into the scaling down operations, it is significant that there are none in S. 13. The introduction of the theory of renewal in Ss. 8 and 9 is in accord with the declared policy of the Act, contained in S. 7, that any contract to the contrary in regard to a debt payable by an

1. (1939) 2 M.L.J. (N.R.C.), p. 57, (C.R.P. No. 1529 of 1938).

agriculturist at the commencement of the Act shall be ignored. The language of the section leaves it clear that the contracts referred to are those already entered into *i.e.*, before 22-3-1938. There is however no similar enunciation rendering un-enforceable contracts entered, subsequent to 22-3-1938, by which a debtor may waive, forego or abandon the benefits he may be entitled to under the Act in respect of a liability he had already incurred. Future contracts not being invalidated, by renewing a liability which arose before 22-3-1938, subsequent to that date, the debtor in effect gives up his rights to claim the advantages accruing under Ss. 8 and 9, if any, and elects to take the limited relief afforded by S. 13. This view is also in consonance with the rulings which hold that where after the passing of the Act, a debtor does not, in a suit to enforce an earlier liability, set up his plea to the benefit of S. 8 or S. 9, or where after a decree has been passed before the Act during the pendency of an appeal therefrom he does not claim a scaling down of his liability under those sections in the appeal, he will be precluded thereafter from claiming such benefit at any later point of time, see *Kotayya* v. *Venkata Punnayya*[1], *Srirama Reddi* v. *Srirama Reddi*[2]. The conclusion arrived at in the instant decision that there is a *terminum a quo* as well as a *terminus ad quem* within which a debt should have been incurred for S. 9 to apply, and that where the debt sought to be scaled down has been contracted after 22-3-1938, S. 13 alone can apply and the theory of renewals cannot be imported has the merit of harmonizing the provisions of the Act and making them logical.

RANGA RAO NAIDU *v.* JANAKI PRASAD, (1941) 2 M.L.J. 452.

A point concerning the scope of S. 152, Civil Procedure Code, came up for decision in the above case and it was held that there was no warrant for restricting the section to the correction of errors or mistakes which occur for the first time in the plaint or subsequent proceedings. There is nothing in the section itself about the stage or time within which the mistakes sought to be corrected should have arisen. Nor should there be any limitation according to the sense of the thing. The power is one intended to promote the ends of justice and avoid its miscarriage and it will be an unnecessary hindrance to prescribe any time limit. The interpretation, however, of this 'slip rule' has occasioned a diversity of judicial opinion. Some decisions have held that S. 152 is inapplicable to rectify mistakes which had an origin anterior to

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1. (1940) 2 M.L.J. 202.
2. (1941) 2 M.L.J. (N.R.C.), p. 46.

the filing of the suit, see *Bala Prasad* v. *Kanoo*[1], *Ramchander Sarup* v. *Mazhar Hussain*[2], *Shujaatmand Khan* v. *Govind Behari*[3]. Other cases have taken a wider view of the scope of S. 152. In *Somasundaram Chettiar* v. *Veluswamy Naicker*[4], it was observed: "the time when the clerical errors . . . . . . were first introduced in the transactions or proceedings between the parties is immaterial and the Court has power to amend such clerical errors",—see also *Mahaboob Begum Sahiba* v. *Lal Begum Saheba*[5]. It is not however clear whether in the first case the mistake that crept into the pleadings and decree was one anterior to the suit, occurring in some document copied into the plaint. *Maung Chit Hlaing* v. *N. A. R. M. Chetty*[6], *Satyanarayana Rao* v. *Purnayya*[7] and *Shiam Lal Pandit* v. *Mt. Moona Kuar*[8], are however such cases, and the mistakes were corrected on application to amend the decree under S. 152. The view taken in the instant decision is not only in accord with the earlier Madras decisions but receives support from the rulings of the Lucknow Chief Court and the Rangoon High Court.

Judicial opinion is not uniform as to the procedure to be followed in such cases. In *Somasundaram Chettiar* v. *Veluswamy Naicker*[4], it has been suggested that the Court can on application under S. 152 amend the mistake or error in the decree without the necessity of having the prior pleadings in which the same errors had appeared themselves amended as a preliminary requisite to the amendment of the decree. But in *Latchayya* v. *Seethamma*[9], it was stated that the applicant should apply for the rectification of the deed wherein the mistake originally appeared and then apply for the amendment of the plaint before the decree is executed and finally apply for the amendment of the judgment and decree to correspond with the amended plaint. In *Aziz Ullah* v. *Collector of Shahjahanpur*[10], the Allahabad High Court has expressed the view that where the mistake first occurred in a mortgage deed which was copied into the plaint, the decree and the sale certificate, correction of the mistake in the plaint, decree and sale certificate could be sought by the same application and that in such a case while the Court will act under S. 152 to amend the decree, it can order correction in the plaint and the other documents only in the exercise of its inherent powers under S. 151. This distinction stands supported by the language of S. 152 which in terms refers

1. (1911) 14 I.C. 407 (Nag.)
2. (1919) 51 I.C. 55 (All.)
3. A.I.R. 1934 All. 100 (2).
4. 1914 M.W.N. 107.
5. (1921) 14 L.W. 445.
6. A.I.R. 1924 Rang. 104.
7. (1930) 61 M.L.J. 805.
8. (1933) I.L.R. 8 Luck. 734.
9. (1932) 62 M.L.J. 350.
10. (1932) I.L.R. 54 All. 800.

to amendments of judgments, decrees and orders only. In view of the diversity of judicial opinion on the question of procedure to be followed in getting the mistakes corrected, elucidation by the Privy Council is certainly to be desired.

NARIKKAL CHATHAN *v.* VEETHIYOTTILLATH KESAVAN, (1941) 2 M.L.J. 455:

This case affords an illustration of seemingly plain language in a statute giving rise to conflicting interpretations. Ss. 14 and 20 of the Malabar Tenancy Act dealing with suits for eviction by a landlord state *inter alia* that if the "landlord requires the holding *bona fide* for his own cultivation", a suit for eviction shall lie. The phrase '*bona fide*' means 'honestly', see *Queen* v. *Holl*[1]. Its correct province is to qualify things or actions that have relation to the mind or motive of an individual. In other words it refers to a mental fact and not to a fact completely within physical apprehension. As regards the term 'require', Hamilton, L.J., observed in *Metropolitan Water Board* v. *Johnson & Co*[2]: "The word 'require' is used in respect of an animate person, and presumably, therefore, has some reference to his mentality. I do not think that the word 'require' can be construed as meaning 'need' ". It is thus clear that the expression 'the landlord requires the holding *bona fide* for his own cultivation' has no relation to any genuine 'need' felt by the landlord, but merely, that he should honestly and not corruptly or out of ulterior motives desire to have the holding for his own cultivation. The only limitation that can therefore attach is that the Court must be satisfied that the assertion by the landlord is not an empty declaration or prompted by ulterior motives and it will be competent to the Court to investigate whether the statement was honestly made, see *Narayanan Moossad* v. *Mammadissa*[3]. On this test, it is easy to agree with the conclusion of Buckland, J., in *Rekhabchand Doogar* v. *D'Cruz*[4],—a case under the Calcutta Rent Act, 1920—that a landlord who with a view to let at a profitable rent the place where he was actually residing gave notice to a tenant in occupation of other premises belonging to him to vacate the same as being required for his own occupation, cannot be deemed to 'require the premises *bona fide* for his own occupation', without at the same time accepting his dictum that the word 'require' imports the element of 'need' and should be something more than 'desire'. Buckland, J's dictum however found favour in Madras, in *Raman Nayar* v. *Kesavan Embrandri*[5], but a

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1. (1881) 7 Q.B. D. 575.
2. (1913) 3 K.B. 900 (C.A.).
3. A.I.R. 1937 Mad. 795.
4. (1922) 26 C.W.N. 499.
5. (1941) 2 M.L.J. 456, f.n.

contrary view was taken in *Eerayi Achuthan* v. *Poochakkandi Panakat Katheeja Bi*[1]. The instant decision by its approval of the latter view has interpreted the expression 'requires *bona fide*' in conformity with the sense of the words as accepted in English law.

EMPEROR *v.* BATLIWALLA SONS & CO., LTD., I.L.R. 1941 Bom. 186:

The meaning of the expression "outside the office" in S. 73 of the Indian Companies Act, 1913, prescribing that every limited company shall paint or affix its name on the outside of every office or place in which its business is carried on was the subject of decision in the above case. It was held that where the office of a limited company was located on the upper storey of a bungalow which had a compound with two gates, the placing of the board bearing the name of the company outside the office room was a sufficient compliance with the section and failure to have the boards outside the premises cannot justify the imposition of a penalty under S. 74. The term 'office' merely signifies a place where a particular kind of business or service for others is transacted, the room in which the business or work of a large concern or company is carried on or from which it is directed. In this sense an office need not even be a completed building, *R* v. *Manning*[2]. A name board might be intended to serve one or some or all of three purposes, namely, (1) to secure publicity and advertisement for the company, (2) to facilitate and assist customers to locate the office, or (3) to emphasise and impress upon the public its distinctive character, that it is a *limited* company. Obviously the first of these considerations being a matter affecting the company only could not be the basis of the penal provision in S. 74. Nor can the second of the objects be the basis of the prescription. If customers find difficulty in locating the office it might result in business falling, but that will be no reason to treat failure to have a name board as required an offence. The *raison d'etre* is really the third of these considerations. In regard to S. 93 (1) (*a*) of the English Companies Act, 1929, Palmer states:[3] "Why this solicitude on the part of the legislature as to the publication of a company's name? The answer is, that the legislature whilst allowing limited liability desired by this means to make the company itself continually bring to the notice of those who dealt or might deal with it the fact that it was limited." For it is essentially in the interests of the public that they should know the

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1. (1941) 2 M.L.J. 458, f.n. 2. (1871) 25 L.T. 573.
3. Company Law, 15th edn., p. 261.

nature of the company, since rights and liabilities are differently conditioned according as a company is limited or not and the public should not be misled or deceived in this respect. Such being the object underlying the rule in S. 73 and the penalty in S. 74, when once the public receive intimation before they get into the office that it is a limited concern with which they are invited to do business, by the name board being displayed outside the room, it can scarcely be contended that there is a violation of S. 73 by the board not being exhibited in the compound as well.

AMBABAI *v.* KESHAV BANDOCHAND, I.L.R. 1941 Bom. 250.

In this case it is decided *inter alia* that Jains are within the ambit of the term 'Hindu' in the Hindu Law of Inheritance (Amendment) Act, 1929 and that the phrase 'law of Mitakshara' in S. 1 of that Act includes the Mayukha school as well. That the Mayukha school was only a sub-school of the Mitakshara is borne out by the Privy Council decisions that the Mitakshara is universally accepted by all the schools except that of Bengal as of the highest authority, see *Bhugwandeen* v. *Myna Bai*[1], *Collector of Madura* v. *Mootoo Ramalinga*[2]. The expression "according to the school of the Mitakshara law, by which the male was governed" in S. 3 (b) of the Act is also a pointer in the same direction. In the statements of Objects and Reasons to the Bill, after specifically excluding the Dayabhaga school from the purview of the Bill it is mentioned that "the Bill will not make any serious inroad upon the law as understood in the province subject to the Mayukha, nor will it seriously affect the law as understood in the province of Madras", thereby showing that all the provinces acknowledging the supreme authority of the Mitakshara are to be within the scope of the Act. It is thus clear that the phrase 'law of Mitakshara' should be understood as a compendious way of referring to Hindu law inclusive of the Mayukha school, but exclusive of the Dayabhaga school. Curiously enough a statement of Sir Dinshaw Mulla in the 7th edition of his Hindu law, in discussing the position of the sister in Bombay after the passing of the Act II of 1929—"This difficulty (namely, as to the sister's position) cannot arise in places where the Mayukha is the over-ruling authority, such as Guzarat . . . for the Act applies only to cases subject to the law of the Mitakshara"[3]—seems to suggest a contrary conclusion. The view taken in the decision under review does not however lend support to that conclusion and is in accord

1. (1867) 11 Moo. I.A, 488, 507, 508.
2. (1868) 12 Moo. I.A. 397.
3. P. 40.

with what has generally been accepted as the correct position, that the Mayukha school is not a separate school of Hindu law but is only a sub-school of the Mitakshara law.

CHHOTIBAI DAULATRAM *v.* MANSUKHLAL JASRAJ, I.L.R. 1941 Bom. 34.

This case decides an interesting question under the Indian Registration Act, namely, whether properties subject to an attachment before judgment in a money suit can on a decree being passed in terms of compromise of the suit claim, containing *inter alia* a provision charging the self-same properties as security for payment of the decretal amount, be said to form the subject-matter of a suit or proceeding for purposes of S. 17 (2) (*vi*) of the Act, exempting such a decree from necessity for registration. In answering the question in the negative, Beaumont, C.J., and Wassoodew, J., hold that the term 'proceeding' in the section means an independent orininating proceeding and will not include any interlocutory proceeding, thereby dissenting from the view expressed in *Govindasami Mudaliar* v. *Rasu Mudaliar*,[1] that an application for an attachment before judgment will be a 'proceeding' within the meaning of S. 17 (2) (*vi*)—a view approved in Bombay itself in *Krishna* v. *Madhav*.[2] S. 17 requires registration of all non-testamentary instruments which operate to create, etc., any right, title or interest of the value of Rs. 100 and more to or in immovable property. Sub-S. 2 postulates certain exceptions. According to Cl. (*vi*) nothing in S. 17 (1) (*b*) or (*c*) shall affect "any decree or order of a Court, except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding." Under the clause as it originally stood all "decrees and orders of Courts" were exempted from necessity for registration, but the present clause was substituted by S. 10 of the Transfer of Property (Amendment) Supplementary Act, 1929. What then is the import of the expression 'subject-matter of the suit or proceeding'? An allied expression 'relates to the suit' in O. 23, r. 3, C. P. Code has been construed as being wide enough to include cases where immovable property is charged by a decree passed in terms of a compromise with payment of the decretal amount in suits for money, see *Joti Kuruvetappa* v. *Izari Sirusappa*,[3] *Gobinda Chandra Pal* v. *Dwarka Nath Pal*.[4] The expression 'subject-matter of the suit' is however a much narrower expression.

1. (1934) 68 M.L.J. 41: I.L.R. 58 Mad. 781. 2. I.L.R. (1938) Bom. 738.
3. (1907) I.L.R. 30 Mad. 478. 4. (1908) I.L.R. 35 Cal. 837.

'Relates' means 'refers to' or 'is connected with,' and hence can cover cases of property not being directly but only indirectly or incidentally associated with the litigation. As has been pointed out in *Ramayya* v. *Ranga Raju*,[1]—in holding that a decree in terms of a compromise creating a charge on lands, in a suit on a promissory-note executed by a father claiming relief against his sons also by way of a prayer to have the liability satisfied out of the joint-family properties, requires registration—there must be a claim or right in or to the specific immovable property asserted in the litigation and relief sought in respect thereof in order to make the said property the subject-matter of the litigation. The question will then be whether, when immovable property over which a compromise decree purports to create a charge had been the subject of an order for attachment before judgment in the suit, the application was not a 'proceeding' the subject-matter of which was the land in question, and as such whether the order was not exempt from the need for registration, and whether by reason of such exemption of the order the compromise decree which in effect extends the effect of the attachment order by charging the properties concerned with the payment of the decretal amount will also not be equally exempt. The C. P. Code treats an application for attachment before judgment as a "supplemental proceeding"—see the heading of Chapter VI. Also, a 'proceeding' signifies in legal parlance "any application to a Court of Justice, however made for aid in the enforcement of rights, for relief, for redress for injuries, for damages or for any remedial object".[2] Thus a 'proceeding' may be either originating or interlocutory, and an application for attachment may be a 'proceeding' in that sense. The question will still remain whether it is in that sense that the term has been used in S. 17 (2) (vi). The collocation 'suit or proceeding' seems to suggest an *ejusdem generis* construction. Further an attachment is merely in the nature of an injunction restraining a party from disposing of the land or property. It is an order operating in *personam* only and does not create any right or interest in the land. The view taken in the decision under review seems for the reasons set out to be more acceptable than that expressed in *Govindasami Mudaliar* v. *Razu Mudaliar*[3].

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1. (1938) 1 M.L.J. 325.
2. Black, Legal Dictionary, 2nd edn., p. 947.
3. (1934) 68 M.L.J. 41: I.L.R. 58 Mad. 781.

PATTU ACHI *v.* RAJAGOPALA PILLAI, (1941) 2 M.L.J. 134.

How the blending of modern notions of inheritance with the purely spiritual idea underlying the Hindu conception of adoption may produce a situation where fiction and logic are irreconcilable is illustrated by this case, where a question of some importance and difficulty in the law of adoption fell to be decided directly. The decision was that an adopted son will, immediately on adoption, acquire a right to sue for recovery of property unauthorisedly alienated by his adoptive mother prior to his adoption even where such property had been vested in her not as heir to her husband but as heir to her predeceased son. It is indisputable that where the adopting widow had inherited the property from her husband "the rights of an adopted son are not prejudiced by any unauthorised alienation by the widow which precedes the adoption which she makes," *Collector of Madura* v. *Mootoo Ramalinga*,[1] *Bonomali Roy* v. *Jagat Chandra Bhowmick*.[2] This is because the adoption of a son is tantamount to the appointment of an heir to the husband and prior to the Hindu Women's Rights to Property Act, 1937, a son was superior to the widow as an heir and when a widow adopts she is creating an heir who comes in front of her. It was open to the widow to adopt or not, but when she elected to adopt, she having by her deliberate act created an heir who under the law would rank prior to her in the line of succession to her husband, should be deemed to have intended the natural and legal consequences of her act. But where after inheriting as a mother, a widow adopts, the position is not the same, see *Madana Mohana* v. *Purushothama*.[3] There is no question of the appointment of an heir to her husband in such a case, for the property if any had already devolved on his son who thereby had become the last full owner. Nor is there any doctrine making the validity of an adoption dependent on the adoptee taking property. The doctrine of devolution of property is altogether a secondary consideration in regard to the capacity of a widow to adopt, *Amarendra Man Singh* v. *Sanatan Singh*.[4] The validity of an adoption is not conditioned by the existence of any estate. Why then should it be that on adoption by a widow after having inherited to her son, the estate so vested in her should be divested? That the divesting cannot certainly be justified on the ordinary rules of inheritance has often been conceded, see *Rai Jatindra Nath Chowdhuri* v. *Amritlal Bagchi*,[5] *Hamed Gazi* v. *Sadat Ali Sikdar*.[6] The question will therefore be

1. (1868) 12 Moo.I.A. 397, 443 (P.C.).
2. (1905) 15 M.L.J. 267: L.R. 32 I.A. 80: I.L.R. 32 Cal. 669 (P.C.).
3. (1918) 35 M.L.J. 138 : L.R. 45 I.A. 156 : I.L.R 41 Mad. 855, 859 (P.C.).
4. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642, 650 (P.C.).
5. (1900) 5 C.W.N. 20. 6. (1940) 44 C.W.N. 443.

whether there are any special considerations why the ordinary rules of inheritance shall not apply. Various suggestions are to be found in the judicial decisions. One such is that by adopting a son to her husband a widow must be presumed to intend the vesting of the estate that originally belonged to her deceased husband in such adopted son, see *Rai Jatindra Nath Chowdhuri* v. *Amritlal Bagchi.*[1] This theory cannot obviously apply where the inherited property consisted of the self-acquired or separate property of her deceased son. Again, to argue that the mother should be deemed to hold the inherited property as her husband's property and thereby intended its divestiture has no warrant either factual or otherwise. Another suggestion is that the effect of the adoption being to make the adopted son the son of her husband, he must be treated as if he had been born or at all events conceived in the life-time of her husband and his title relates back to the date of the death of the predeceased son, so that if the latter left no widow or child who would succeed him to the exclusion of his younger brother by adoption, such adopted son succeeds as heir to his father. *Apropos* this line of reasoning the Allahabad High Court has remarked: "this view seems to be the reasonable and necessary consequence of the fiction that the widow, by adoption, makes the adopted son the son of her deceased husband," *Lakhmichand* v. *Gatto Bai.*[2] The theory is clumsy and unworkable and will really carry fiction to illogical limits. A third explanation in support of the doctrine of divestiture is to be found in *Sukhdevdoss Ramprasad* v. *Mt. Choti Bai*,[3] where it is stated that in all these cases the nature of the estate to be divested is irrelevant and that it is *the person by whom it is held that should be considered,* the suggestion being that if the estate was with the widow it will be divested but not if it is with any one else. This view has no longer any force having regard to the rulings of the Privy Council that even where properties had vested absolutely in a third person there might be a divestiture of such estate in favour of the adopted son in certain circumstances, see *Amarendra Man Singh* v. *Sanatan Singh*,[4] *Vijai Singji* v. *Shiva Sangji.*[5] Yet another explanation to support divestiture is to be found in *Hanmant Subbayya* v. *Krishna Manjinath*,[6] namely, that by virtue of the adoption, the adopted son acquired an "*inherent right*" to the property with the widow and the fact that there had been a predeceased son from whom only the widow got the property in no

1. (1900) 5 C.W.N. 20.
2. (1886) I.L.R. 8 All. 319.
3. (1927) 27 L.W. 145.
4. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).
5. (1935) I.L.R. 59 Bom. 360.
6. (1925) I.L.R. 49 Bom. 604, 607.

way affected the right. It may be remarked that this is really an assumption serving as an argument.

In *Suryanarayana v. Ramadoss*[1] it has been remarked by Seshagiri Aiyar, J: "The *Guntur case*[2] . . . is authority for the proposition that a mother succeeding as heir to her son would be divested by her adopted son of the inherited property. There can be no distinction in principle between property owned as ancestral or which is taken as a self-acquisition". The last statement does not seem to be sound in principle as it ignores the fact that the adopted son can at best on adoption be entitled to succeed only to what is or could have been the property of the adoptive father, and not for instance to property which the adoptive mother has inherited from her own father or which she holds as stridhana. If property which she had inherited from her father will not be divested on an adoption by her there is no reason why property which she had inherited from her son should be subject to a different result. *The Guntur case*[2] has, however, been relied on as postulating divestiture in such circumstances, at any rate, of property inherited by the widow from her son, see *Jamnabai* v. *Raychand Nahalchand*[3], which in its turn was looked upon as decisive of the question in *Raviji Vinayakrav Jagannath Shankarsett* v. *Lakshmibai*.[4]

In the *Guntur case*[2], no doubt the adoption was made by a widow who had succeeded to a zemindari as heir to her son. The Privy Council stated: "There is no ground for saying that because the estate descended to the son natural born of the original Zemindar, and the widow of the latter took it as heiress of her son and not immediately from her husband the adoption made by her if otherwise valid therefore became invalid". At another place the Privy Council observed: "The fact of the descent being cast would have made no difference unless the case fell within the authority of that of *Chundrabullee* reported in the 10th Moore." All these observations are however concerned only with the validity of the adoption and not with the divestiture of estate as a consequence thereof, the case itself being one where the adopted son sued for recovery of possession of the estate *after the death of the adoptive mother*, from her daughters who had taken possession of the same. In *Mt. Bhoobun Moyee* v. *Ramkishore*,[5] the Privy Council had explicitly laid down that in the case of inheritance *the person to succeed must be the heir to the last full owner*, but had added that if after inheriting to her son who had died unmarried the widow adopted to her husband, she would have divested no

1. (1917) 34 M.L.J. 87: I.L.R. 41 Mad. 604.

2. *Venkatakrishna Rao* v. *Rama Lakshmi* (1876) L.R. 4 I.A. 1: I.L.R. 1 Mad. 174 (P.C.).

3. (1883) I.L.R. 7 Bom. 225.

4. (1887) I.L.R. 11 Bom. 381.

5. (1865) 10 Moo.I.A. 279, 311, 312 (P.C.).

estate but her own and "this would have brought the case within the *ordinary rule*". How the case will fall within the *"ordinary rule"* set out earlier, is difficult to envisage, for if really the adopted son in such a case divested his mother, it certainly cannot be in the capacity of heir to the last full owner. That in fact the Privy Council did not in any manner pronounce on this question either in *Chundrabullee's case*[1] or in the *Guntur case*[2] is clear from the observations of the Board in *Ramasami Aiyan* v. *Venkataramaiyan*[3]: "Whether by the act of adopting another son she in point of law divested herself of that estate in favour of the second son may be a question of some nicety *on which their Lordships give no opinion*". Incidentally it falls to be noted that Sir James Colvile, who was a member of the Board was also a party to the decision in the *Guntur case*[2].

A number of decisions have in fact taken the view that where a woman after succeeding as heir to her son adopts a boy, the adopted son will neither divest her estate, [see *Bykant Monee Roy* v. *Kisto Soonderee Roy*[4], *Puddo Kumaree* v. *Juggut Kishore*[5]] nor can recover property unauthorisedly alienated by her so long as she is alive, [see *Gobindo Nath Roy* v. *Ram Kanay Chowdhry*[6]].

To treat the rights of the widow in the property which she holds as heir to her son as being co-extensive in all respects with the rights which she possessed when she held it as her husband's heir, or to remark that if an alienee could be defeated by a first adoption except in the case of necessity it is difficult to see why he should not be defeated in the case of a second adoption seems with all respect, to push analogies beyond the permissible limits. There is no binding decision of the Privy Council on the point. Judicial opinion of the Calcutta High Court in its early decisions is against the theory of divestiture of the mother's estate. The Bombay view in favour of divestiture rests on a loose appreciation of the scope of the ruling in the *Guntur case*[2]. Nor is the view in consonance with the doctrine that inheritance should be traced to the last full owner. Above all to hold in favour of divestiture of the mother's estate will be opposed to the policy underlying the Hindu Women's Rights to Property Act seeking to give the widow a share even when there is an *aurasa* son. Nor is it open to us to seek consolation in the fact that law is not always logical, a course deprecated by the Privy Council in another context[7]. In these circumstances it is highly essential that the point dealt with in the instant decision should be elucidated finally by the Judicial Committee.

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1. *Mt. Bhoobun Moyee* v. *Ram Kishore,* (1865) 10 Moo.I.A. 279 (P.C.).
2. (1876) L.R. 4 I.A. 1: I.L.R. 1 Mad. 174 (P.C.).
3. (1879) L.R. 6 I.A. 196: I.L.R. 2 Mad. 91 (P.C.).
4. (1867) 7 W.R. 392.
5. (1879) I.L.R. 5 Cal. 615, 644.
6. (1875) 24 W.R. 183.
7. *See* (1918) 36 M.L.J. 493: 46 I.A. 72: I.L.R. 42 Mad. 523 (P.C.).

HAMIDGANI AMMAL *v.* AMMASAHIB AMMAL, (1941) 2 M.L.J. 622 (F.B.).

This Full Bench decision holds that a person brought on record in execution proceedings as the legal representative of a judgment-debtor is not compelled to have his own claims to the property in suit decided in the execution proceedings but can establish his rights by a separate suit. O. 22, r. 4 (2), Civil Procedure Code which entitles the legal representative of a defendant to make only a defence appropriate to his character as such legal representative is not applicable to proceedings in execution of a decree or order (see O. 22, r. 12). There is no bar to a legal representative urging his independent rights in execution, if in fact he is bound so to do under S. 47. That section directs that all questions between the parties to the suit in which the decree was passed or their representatives and relating to the execution of the decree shall be determined by the executing Court only. In *Kuriyali* v. *Mayan*[1], a case of a suit on a mortgage, the legal representative who was brought on record on the death of the judgment-debtor after the passing of the mortgage decree claimed in the execution proceedings an independent title to the mortgaged property. The Munsif investigated the matter in execution but on appeal the District Judge held that the title of the legal representative cannot be investigated in execution but that there should be an attachment in which the legal representative can make a claim and in that way have his title gone into. That course was adopted. The claim being rejected, the legal representative (claimant) brought a separate suit to have the execution sale annulled. It was held that the suit was incompetent. In doing so the High Court pointed out that it makes no difference whether the legal representative was brought in before the decree or after, that S. 50 (old S. 234) fully empowers the executing Court to inquire whether any particular property in the hands of the legal representative or which came into his hands was the property of the deceased judgment-debtor and that S. 47 (old S. 244) prohibits any separate suit to investigate the question whether the property mentioned in the decree was available for execution, the question being one relating to the execution of the decree and arising between the decree-holder and the legal representative of the judgment-debtor. It is true that the decision overlooked the fact that the decree being a mortgage decree there can be no question of any attachment in execution; nevertheless it is valuable as expounding the scope of S. 47, and in fact that aspect fell to be noticed commanding the approval of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*[2]. That was a case where the question arose

1. (1883) I.L.R. 7 Mad. 255.

2. (1892) L.R. 19 I.A. 166; I.L.R. 19 Cal. 683 (P.C.).

whether a judgment-debtor can sue to set aside a Court auction sale in execution of a decree on the ground of collusion between the decree-holder and the auction purchaser in proceeding with the sale while in fact the decree had been satisfied as against the particular judgment-debtor, and contrary to an agreement with him not to bring the property to sale. In repelling the contention that the suit will be competent inasmuch as the auction purchaser who was alleged to have colluded with the decree-holder was not a party to the decree in the suit and hence not among the "parties" referred to in S. 47 and relief against him also was sought, Lord Macnaghten referred to their Lordships examining, *Kuriyali* v. *Mayan*[1] and other cases to understand the scope of S. 47 as interpreted in India and then stated: "It is of the utmost importance that all objections to execution sales should be disposed of as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of S. 244 (now S. 47). In *Amirchand* v. *Bakshi Harihar Prashad Singh*[2], a decree for sale was passed in a *mortgage suit*. After the decree was made, one of the defendants died and in the application for the execution of the decree the legal representative of the defendant was brought on record. He raised objections before the execution Court to the execution proceeding. Some of the objections were rejected. Later on, the legal representative filed a suit raising the same objections but adding two other persons as parties. In dismissing the suit as incompetent, Sir John Edge after citing Lord Macnaghten's observations in *Prosunno Kumar Sanyal's* case[3] remarked: "The questions raised in this suit *could* have been . . . raised by Babu Amir Chand under S. 244 of the C. P. Code, 1882, and *whether then raised or not* . . . they are questions which relate to matters which by S. 244 was enacted 'shall be determined by orders of the Court executing the decree and not by a separate suit'." *Kuriyali* v. *Mayan*[1] was thus approved in *Prosunno Kumar Sanyal's case*[3] by the Privy Council and this in turn was followed in *Amir Chand* v. *Bakshi Harihar Prashad Singh*[2].

The view in *Kuriyali* v. *Mayan*[1] has also been adopted in a number of decisions in India, *Vengapayyan* v. *Karimpanakal Parvati*,[4] *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot*,[5] *Kelu*

1. (1883) I.L.R. 7 Mad. 255.
2. (1915) 30 M.L.J. 238 (P.C.).
3. (1892) L.R. 19 I.A. 166: I.L.R. 19 Cal. 683 (P.C.).
4. (1902) I.L.R. 26 Mad. 501.
5. (1906) 17 M.L.J. 377: I.L.R. 30 Mad. 215.

Achan v. *Parasu Pattar*[1], *Venkatakrishnayya* v. *Venkatanarayana*[2] etc.

Some decisions have suggested a distinction between a money decree and a mortgage-decree in this connection. In *Lloyds Bank Ltd.* v. *Rehmat Bibi*[3], Addison and Abdul Rashid, JJ., have pointed out that while in the case of a money decree it is for the executing Court, even where the legal representative raises an objection not open to the judgment-debtor but based on an independent title, to determine how the decretal amount is to be recovered and what property is to be sold in execution, in the case of a mortgage-decree the method of recovery stands determined by the trial Court itself and the claim of a legal representative that certain property is not liable to be sold in execution will be an attack on the decree itself and hence could not be gone into by the executing Court, [see also *Lakshmadu* v. *Ramudu*[4]]. A different view, holding that even in the case of a mortgage-decree the executing Court can examine the independent claim to the property in suit set up by a legal representative, is propounded in *Peer Bathummal Beevi* v. *Nagur Meerammal Beevi*[5], *Chinnathayee* v. *Lakshmi Achi*[6]. The true principle seems to be the one indicated by Edge, C.J., in *Sethchand Mal* v. *Durga Dei*[7], namely, that "where the representative merely asserts that the property sought to be sold is his own property to which he is beneficially entitled by purchase or from its having come to him otherwise than as a representative of the deceased judgment-debtor, it is not a case in which he has set up a *jus tertii*". In such a case it is in execution that the claim will have to be investigated and no separate suit can lie. No doubt the case will be different and a separate suit will be competent if the legal representative opposed the execution on the ground that the property had vested in him as a trustee or as executor of some one else *i.e.*, in some character wholly separate from his personal and individual character. The instant decision in over-ruling *Kuriyali* v. *Mayan*[8] does not seem to have noticed that that decision as expounding the scope of S. 47 (old S. 244) has been cited with approval by Lord Mac-

1. (1916) 5 L.W. 158.

2. A.I.R. 1936 Mad. 733, see also *Machamma* v. *Kanakamma*, A.I.R. 1935 Mad. 923, *Seth Chand Mal* v. *Durga Dei* (1890) I.L.R. 12 All. 313 (F.B.), *Kalicharan* v. *Jewat* (1906) I.L.R. 28 All. 51, *Raj Rup Singh* v. *Ramgolam Roy*, (1888) I.L.R. 16 Cal. 1, *Murigaya* v. *Hyat Saheb* (1899) I.L.R. 23 Bom. 237, *Gokul Singh* v. *Kissen Singh* (1910) I.L.R. 34 Bom. 546.

3. A.I.R. 1939 Lah. 178.

4. I.L.R. (1940) Mad. 123.

5. (1936) 71 M.L.J. 725.

6. (1936) 71 M.L.J. 511.

7. (1890) I.L.R. 12 All. 313 (F.B.).

8. (1883) I.L.R. 7 Mad. 255.

naghten in *Prosunno Kumar Sanyal's case*[1], which again has been followed by the Privy Council in *Amir Chand* v. *Bakshi Harihar Prashad Singh*[2], a case where the objections were raised by the legal representative of a defendant in a *mortgage suit* to the execution of the mortgage-decree for sale. In these circumstances therefore the decision under review cannot be deemed to be the last word on that subject.

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1. (1892) L.R. 19 I.A. 166: I.L.R. 19 Cal. 683 (P.C.).
2. (1915) 30 M.L.J. 238 (P.C.).

KARAN SINGH *v.* RAM SAHAI, I.L.R. (1941) ALL. 39.

This case decides a question of practice. It holds that an *interim* attachment before judgment is effective against a transfer of property made by the debtor after affixation of a copy of the attachment order on the property affected, *though no copy of the order had been served upon the debtor.* O. 38, r. 7, C. P. Code states that in the case of an attachment before judgment, save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree. As there is no express provision elsewhere on the subject in any of the rules relating to attachment before judgment it follows that such attachments are governed by the provisions of O. 21, r. 54. This rule merely states that in the case of immovable property the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property and that the order shall be proclaimed at some place on or adjacent to the property and that a copy of the order shall be affixed on a conspicuous part of the property. There is however no direction that a copy of the order should be personally served upon the owner of the property attached. It is settled law that " no property can be declared to be attached unless first the order for attachment has been issued, and secondly in execution of that order, the other things prescribed by the rules in the Code have been done;" *Muthiah Chetti* v. *Palaniappa Chetti*[1]. Unless all the processes of attachment which are required by law to effect a valid attachment have been *served*, there is no such valid attachment of the property as would interdict its transfer, under S. 64, C. P. Code, *Bai Hakimbu* v. *Dayabhai Rugnath*[2]. Does this mean that though not prescribed under the Code, notice of attachment under O. 21, r. 54 should be served on the defendant? Certain observations in *Ramanayakudu* v. *Boya Pedda Basappa*[3], seem to favour this construction. Phillips, J., observed in that case: " The rule says that the order must be one prohibiting the judgment-debtor, and . . . . in order to make an order prohibitive, the person prohibited must have the opportunity afforded by the application mentioned in Cl. 2 of r. 54 of *knowing* that he is so prohibited . . . A perusal of rr. 43, 44, 46, 47, 48 and 51 to 53 of O. 21 shows that the principle underlying the procedure in each case is to make the attachment *known* to the person affected by the order." If knowledge is thus the main element, it is difficult to see how a mere affixture of the order on the property could ensure that object. A recent decision, *Appanna Sastri* v. *Raja Sobhanadri Appa Rao*[4], has held that there is no necessity under S. 117 of the Estates Land Act to give *personal* notice of a sale

1. (1928) 55 M.L.J. 122: L.R. 55 I.A. 256: I.L.R. 51 Mad. 349, 356 (P.C.).
2. A.I.R. 1939 Bom. 508.
3. (1919) 36 M.L.J. 284: I.L.R. 42 Mad. 565
4. (1941) 2 M.L.J. 947.

in execution of a rent decree to the defaulter. This is so by reason of the fact that the section expressly provides for the defaulter to receive a copy of the proclamation of sale by post,—a provision which might lend support to the argument that no personal service is needed in such cases. In O. 21, r. 54, C. P. Code, there is however no provision either for personal service or service by post.

AHMAD SAYEED *v.* KANIZ ZOHRA, I.L.R. (1941) All. 278.

According to this decision a tailor is an artisan and a sewing machine " tool of an artisan " within the meaning of S. 60 (*b*) of the Code of Civil Procedure. The scope of the latter provision recently fell to be examined by the Madras High Court in *Manikyam* v. *Manikyamma*[1], where it was held that a musician is not an artisan and that musical instruments cannot be regarded as " tools of an artisan." The word ' artisan ' occurs in a number of statutes, English and Indian—*see* Artisans and Labourers Dwellings Act, 31 and 32, Vic. c. 170, Artisans and Labourers Improvements Act, 38 and 39, Vic. c. 36, The Settled Land Act, 1882, S. 25 (10), The Madras Towns Improvements Act (III of 1871), The Indian Limitation Act (XV of 1877), The Madras Hereditary Village Offices Act (III of 1895), S. 3, etc.—but the term is nowhere defined. In Murray's Dictionary an artisan is stated to be " one who practises or cultivates an art—an artist." But it is stated in the Oxford English Dictionary that this meaning of the term is now obsolete and that " artisan " means "one who is employed in any of the industrial arts, a mechanic, handicraftsman, artificer." A similar definition is found in Dr. Anandale's Dictionary where an artisan is stated to be " one skilled in any art or trade, a handicraftsman, a mechanic." Webster's New International Dictionary refers to him as " one trained to manual dexterity in some mechanical art, a handicraftsman, a mechanic." Thus according to the dictionaries in modern times the term ' artisan ' does not include an artist but signifies an artificer, a handicraftsman or a mechanic. The Law Dictionaries also reveal a similar conclusion. Wharton[2] equates an artisan with an artificer, while Stroud[3] expresses himself more guardedly and states that an ' artisan ' is probably a synonym for ' artificer.' About the meaning of the term ' artificer ' there is however no dispute. He is a person who is master of his art and whose employment consists chiefly in manual labour. In fact he is a skilled workman, one who *makes* something as distinguished from one who merely *does* something, *Morgan* v. *London General Omnibus Co.*[4] It would thus appear that an artisan is a handicraftsman or a mechanic who makes something and is not a mere manual labourer or workman. An estate agent

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1. (1941) 2 M.L.J. 671.
2. Law Lexicon, 14th Edition, p. 84.
3. Judicial Dictionary, 2nd Edition, p. 121. 4. (1884) 13 Q.B.D. 832.

will not be an artisan, In re *Lord Gerard's Settled Estate*[1]; nor a washerman, Ex parte *Poonen*[2], nor a person engaged in giving instructions in wrestling and fencing, *Pylwan Jarkan Sahib Vastath* v. *Janaka Raja Tevar*[3]. On the other hand a soap-maker will be an artisan, *Bindeshri* v. *Banshi Lal*[4]; likewise a tailor, *Vithoba* v. *Babulal*[5]. According to *Maung Tha U* v. *Maung Hla*[6], a musician is possibly engaged in a mechanical employment—though this conclusion is debatable according to *Manikyam* v. *Manikyamma*[7]—but the instruments on which he plays are certainly not his " tools ", for the latter term is used only in regard to instruments used by workmen and it would be putting an unnatural meaning on the words to say that a musical instrument is the tool of an artisan. At any rate, it is difficult to see how a person engaged to drive an engine on board a steamer is an 'artisan' as seems to have been held in *Emperor* v. *Haji Shaik Mahomed Shustari*[8]. In holding that a tailor is an artisan and his sewing machine a " tool of an artisan," the decision under review takes a view which is in consonance with that held in Nagpur and not dissented from elsewhere.

NIMAR PANDEY *v.* JAGADISH PANDEY, I.L.R. (1941) All. 313.

Though the terms " refuse " and " reject " are treated as synonymous in popular parlance as well as by the dictionaries, how they can produce different repercussions in the field of law is seen from the decision under notice. In this case it has been held that where an application to sue as a pauper is dismissed for default of appearance of the applicant *after* notices had been issued to the opposite party and the Government Pleader but before the merits of the application had been considered, the order will not be tantamount to a " refusal " of the application so as to attract the bar of r. 15 of O. 33, C. P. Code, against a second application for such leave in respect of the same right to sue. O. 33, r. 15 enacts that an order *refusing* leave to the applicant to sue as a pauper will be a bar to a subsequent application of a like nature. Disposal of applications for leave to sue as a pauper may take place either under O. 33, r. 5 or under O. 33, r. 7 (3). While an order of *refusal* of leave is in terms contemplated by r. 7 (3) only, r. 5 refers to the *rejection* of an application merely. R. 5 is concerned with the stage before issue of notice to the opposite party and the application fails on a preliminary ground. R. 7 operates only where notice has gone and a day has been fixed for the examination of witnesses by either party and such examination has been made and the arguments,

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1. (1893) 3 Ch. 252, 263.
2. (1876) I.L.R. 1 Mad. 174.
3. (1875) 8 M.H.C.R. 87.
4. (1931) I.L.R. 54 All. 399.
5. A.I.R. 1923 Nag. 289.
6. (1916) 38 I.C. 414.
7. (1941) 2 M.L.J. 671.
8. (1907) I.L.R. 32 Bom. 10.

if any, on the question whether on the face of the application and of the evidence, if any, the applicant is or is not subject to any of the prohibitions specified in r. 5, have been heard. The presence of the word " then " in r. 7 (3) cannot be regarded as accidental or otiose and *prima facie* suggests that a *refusal* of the application can be made only if the inquiry has been held. On this line of reasoning it has been held in a number of cases that where an application for leave to sue *in forma pauperis* is thrown out on the ground of default of appearance on the part of the applicant, though it be *after* notice has been issued to the opposite party, the order will not be one of refusal under O. 33, r. 7 (3) and as such a fresh application for leave will not be barred by r. 15, see *Chinnammal* v. *Papathi Ammal*[1], *Krishnamoorthy* v. *Ramayya*[2], *Baliram Shukul* v. *Mt. Sitabai Shukul*[3], *Maung Aung Tun* v. *Ma E Kin*[4], *Ma Sein* v. *Ma Kya Hmyin*[5]. It is true that the last two decisions were cases where neither party was present on the date fixed for hearing the application, but they do recognise that unless there is a determination of the application on the merits, there is no refusal within the meaning of r. 7 (3) and hence no bar under r. 15. In *Rajendra Nath Paramanik* v. *Tushtamayee Dasee*[6], the Calcutta High Court has laid the test regarding applicability of bar under r. 15, on whether the rejection of the application for leave to sue as a pauper was before or after notice to the opposite party and not on whether the order was one on the merits or *de hors* the same. In an earlier case however where the application for leave to sue as a pauper was rejected (after notice had been served on the opposite party) for default of appearance by the applicant it was practically assumed that it made no difference whether the order was one of rejection under r. 5 or refusal under r. 7 for purposes of the operation of the bar under r. 15, see *Khondkar Ali Afzal* v. *Purna Chandra Tewari*[7] : see also *Atul Chandra Sen* v. *Peary Mohan Mukherjee*[8]. That an order of rejection under r. 5 will not attract the bar of r. 15 is however the view taken by other Courts, *Mt. Bal Kuar* v. *Shib Das*[9], *Ram Lakhan* v. *Kishore Lal*[10], *Baliram Shukul* v. *Mt. Sitabai Shukul*,[3] The latter view is consistent with the fact that the bar under O. 33, r. 15 appears to be that of *res judicata* whereas an order passed under r. 5 is of a summary character based on the petition or on facts apparent at the time of the presentation of the petition. That there is a difference between an order passed under r. 5 and one passed under r. 7 (3) and that it is only where an application has been heard on the merits and refused that the bar of r. 15 can apply and not where the

1. A.I.R. 1925 Mad. 986.
2. (1926) 51 M.L.J. 79: I.L.R. 50 Mad. 63.
3. A.I.R. 1935 Nag. 168.
4. A.I.R. 1924 Rang. 161.
5. (1926) I.L.R. 4 Rang. 245.
6. (1932) I.L.R. 60 Cal. 630.
7. A.I.R. 1924 Cal. 1039.
8. (1915) 20 C.W.N. 669.
9. (1919) I.L.R. 1 Lah. 151.
10. A.I.R. 1933 Oudh 534.

application fails for default of appearance of the applicant—at whatever stage it may be, seem to be the preferable view on the language of the rules. The observation of Chitty, J., in *Baroda Dasi* v. *Upendranath Mandal*[1], that the application in that case was " not a case of an application being dismissed for want of appearance" suggests a difference between dismissal based on a refusal to proceed and that based on a default of appearance, and that in the view of the learned Judge the latter will not amount to a refusal under O. 33, r. 15.

INDER BAHADUR SINGH *v.* SITA RAM, I.L.R. (1941) All. 370.

In this case it has been held that a suit by a member of a Mitakshara joint family to avoid alienations made by a former manager in favour of different individuals and at different times will not be bad for misjoinder of causes of action and parties, by reason of the relief against the various alienees being sought in the same suit. Under O. 2, r. 3, of the Code of Civil Procedure, it is open to a plaintiff to unite in the same suit several causes of action against the same defendant or defendants jointly. This rule must be read with O. 1, r. 3 according to which all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly or severally, where if separate suits were brought against such persons any common question of law or fact will arise. Thus a plaintiff can join different causes of action against different defendants if he is able to bring his case within the purview of O. 1, r. 3. The meaning of 'cause of action' was explained by Lord Watson in *Chandkuar* v. *Partab Singh*[2], where he observed : " the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour ". In the *Commissioners of Sewers of the City of London* v. *Glasse*[3], the principle is laid down by Lord Romilly, M.R., that if the plaintiff claims one and the same right under one and the same title against all the defendants, the bill will not be rendered multifarious by the fact that they may raise different defences. Thus in actions in ejectment in England by a lessee under a demise, all the persons in possession of the different portions of the property are made parties under whatever title they hold and at whatever times such titles are claimed to have accrued in their favour, see *Hodgins* v.

1. (1919) 52 I.C. 562.
2. (1888) L.R. 15 I.A. 756; I.L.R. 16 Cal. 98 (P.C.).
3. (1872) 41 L.J. Ch. 409.

Hickson[1], *Minet* v. *Johnson*[2]. In India also the same procedure is permitted in ejectment suits. In *Ishun Chunder Hazra* v. *Mondol*[3], which was a suit for the eviction of a number of persons who claimed to be in possession of the property in suit in pursuance of different purchases from one Brahmamoyi Debi —a limited owner—it was held that on her death the reversioners can bring a suit against all the alienees and claim relief in the same action and that the suit was not bad for multifariousness. The principle underlying the view was explained by Hill and Brett, JJ., in *Nundo Kumar Nasker* v. *Banomali Gayan*[4], where they stated : "The cause of action of a plaintiff suing in ejectment cannot be affected by the title under which the defendant professes to hold possession. It matters not to the plaintiff how the defendant may explain the fact that he is in possession or seek to defend his possession. What concerns the plaintiff is that another is wrongfully in possession of what belongs to him and that cause gives him his cause of action. If this is so, where there is but one person in possession, can there be a difference when the land is in the possession of more than one ? We think not . . . . What he (plaintiff) is entitled to claim is the recovery of possession of the land as a whole and not in fragments and . . all persons who oppose him in the enforcement of that right are concerned in his cause of action and *ought* accordingly to be made parties to a suit in which he seeks to give effect to it." There is no reason why a suit to set aside alienations by a manager and for recovery of possession from different transferees should not be governed by the same principles. As early as *Sami Chetty* v. *Ammani Achi*[5], it was pointed out that in such cases, the cause of action, the right, is the plaintiff's relation to the family to which the property appertains and on which right if established and if not otherwise barred he will be entitled to his share wherever found and that the fact that various persons have affected to purchase different parcels of the property at different times will not destroy the unity of his ground of action. In *Vasudeva Shanbhaga* v. *Kuleadi Narnapai*[6], the same view was taken by a Full Bench which observed : "It is manifest that the number and nature of the alienations are no unimportant elements for the determination of their propriety. It is most desirable that the whole of them should be at once before the Court called upon to decide the question in order to secure the soundness of the particular decision and perhaps the avoidance of discordant decisions in different cases upon facts nearly the same." This case has been subsequently followed in Madras, see *Mahomed* v. *Krishnan*[7]. In Allahabad, though originally *Vasudeva Shambaga's case* was sought to be distinguished

1. (1878) 39 L.T. 644.
2. (1890) 63 L.T. 507.
3. (1897) I.L.R. 24 Cal. 831.
4. (1902) I.L.R. 29 Cal. 871.
5. (1873) 7 M.H.C.R. 260.
6. (1874) 7 M.H.C.R. 290 (F.B.).
7. (1887) I.L.R. 11 Mad. 106.

on the ground that in that case apparently the decision as to the rights of one person might be affected by the evidence as to the rights claimed by another alienee of the property—*see Ganeshi Lal* v. *Khairati Singh*[1]—in all later cases the Madras Full Bench view has been followed, see *Parbati Kunwar* v. *Mahamad Fatima*[2], *Kubra Jan* v. *Ram Bali*[3], *Bal Krishna Das* v. *Hira Lal Bagla*[4]. The Bombay view also does not seem to be different,see *Raghunatha* v. *Sarosh*[5], *Umabai* v. *Vithal*[6], *Dattatraya* v. *Gopal.*[7] The cause of action against the several transferees is the same as it would have been against the manager if he were alive and the suit will not therefore be bad for misjoinder of causes of action and defendants. The decision under notice also lays down that if in such a case the Court feels it desirable that there should be separate trials under O. 2, r. 6, the proper order to pass will be to ask the plaintiff to amend his plaint and to set out separately the allegations against each transferee in order that separate issues might be framed in respect of each such transaction, thus enabling the Court to try the suit in sections, but yet as part of the same proceedings.

RAJ NANDINI PURKAYASTHA *v.* ASWINI KUMAR CHAUDHURI, I.L.R. (1941) 1 Cal. 457.

The Calcutta High Court decides in this case that an adoption among Hindus will not be invalid merely because the adoptee and the adopter belong to different sub-castes. It is no doubt an ideal of Hindu law that the adopted son should be the reflection of a real son (पुत्रच्छायावहः). A text of Manu says:

माता पिता वा दद्यातां यमद्भिः पुत्रमापदि ।
सदृशं प्रीतिसंयुक्तं स ज्ञेयो दत्रिमः सुतः ॥

—that (boy) alike whom his mother or his father affectionately gives with water, in times of distress must be considered to be an adopted son[8]. The term सदृशं has been the subject of different interpretations. According to Medhatithi[9], it means "alike not by class, but by qualities suitable to the family; accordingly a Kshatriya or a person of any inferior class may be the son of a Brahman." The Kalpataru[10] has similarly stated : "a Sudra even is certainly a son ; such is the meaning." In this view, the adoption of a boy belonging to a different sub-caste will be an *a fortiori* case. Other commentators of Manu—Kulluka, Raghavanand and Nandana—have construed सदृशं as referring to a boy of the same caste. A text of Vriddha

1. (1894) I.L.R. 16 All. 279.
2. (1907) I.L.R. 29 All. 267.
3. (1908) I.L.R. 30 All. 560.
4. (1914) I.L.R. 36 All. 406.
5. (1899) I.L.R. 23 Bom. 266.
6. (1909) I.L.R. 33 Bom. 293.
7. (1931) 134 I.C. 689.
8. IX, 168.
9. Cit., in Dattaka Mimamsa, sec. 2, para 25.
10. Cit., in *ibid.*

Yagnavalkya postulates the same view and prescribes that a son of the same caste should be taken in adoption—स्वजातीयः सुतो ग्राह्यः. Saunaka also positively prohibits the adoption of a boy belonging to a different caste. He has stated: "The adoption of a son by any Brahman must be made from among *Sapindas*, or on failure of these an *asapinda*, otherwise let him not adopt ; of Kshatriyas in their own class positively . . . ; of Vaisyas from amongst those of the Vaisya class ; of Sudras from amongst those of the Sudra class ; of all and the tribes likewise (in their own) classes only and not otherwise." The Mitakshara[1], and the Mayukha[2] agree that an adoption outside the caste is not permissible. The Dattaka Mimamsa[3] and the Dattaka Chandrika[4] have expressed a like view.

Rightly or otherwise in Madras and Bengal, for a long time now, the eligibility of a boy for purposes of adoption rests upon whether the mother of the boy in her maiden state could have married the adoptive father. Judged by this test the adoption of a boy belonging to a lower caste will be permissible in places where *anuloma* marriages are recognised, though the adoption of a boy belonging to a higher caste will be void. In fact this test was applied in negativing the validity of the adoption of a Brahman boy by a Rajbansi Thakur (Kshatriya), see, *Narain Singh* v. *Mt. Shiam Kali Kunwar*[5]. If however spiritual considerations will be the proper measure of the validity of an adoption and form its background as seems to be suggested in *Amarendra Man Singh* v. *Sanatan Singh*[6], the adoption of a boy of a lower caste will be equally invalid. The same result will ensue even where a boy of a different sub-caste is adopted. In *Kusum Kumari Roy* v. *Satya Ranjan*[7], the adoption by an orthodox Hindu of an infant son of a member of the Sadharan Brahmo Samaj (the son having been born after his father had become a Brahmo) was held to be valid. If the spiritual test were to apply, the decision may require reconsideration. The opinion in *Shib Deo Misra* v. *Ram Prasad*,[8] assumes the validity of the adoption of a boy of a different sub-caste without practically any discussion. Were the spiritual rule to operate there will have to be a considerable re-fashioning of the law of adoption and particularly in the province of Bombay. It will however be a matter for consideration, the spiritual principle notwithstanding, whether the adoption of a boy of a different sub-caste will now on a rigorous application of that principle be held void in view of the opinion expressed by the Courts in Nagpur, Calcutta and Allahabad in favour of the validity of such an adoption.

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1. I, IX, 9.
2. IV, 5; 9.
3. Sec. 2, para 25.
4. Sec. 1, paras 12 and 16.
5. (1914) 25 I.C. 45.
6. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.)
7. (1903) I.L.R. 30 Cal. 999.
8. (1924) I.L.R. 46 All. 637.

SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* JODARAJ DHUPAJEE, (1941) 2 M.L.J. 993.

Section 9 of the Madras Land Encroachment Act (III of 1905) provides that the assessment and penalty imposed under the Act on any person in unauthorised occupation of land shall be "deemed to be land revenue" and may be recovered as arrears of land revenue under the provisions of the Madras Revenue Recovery Act, 1864. Under S. 42 of the latter enactment a sale of property on account of arrears of revenue will be free of all incumbrances. In (1940) 2 M.L.J., N.I.C., p. 37, it was pointed out how expressions like "in the same manner as arrears of land revenue," "as if it were arrears of land revenue", "as arrears of land revenue" will not *per se* imply that the property of a defaulter sold for the recovery of the demand in question will pass free of incumbrances to the purchaser, but that if the demand fell by statutory prescription to be included within the term 'public revenue' (*e.g.*, cess regarding water supplied) the position will be different. The Land Encroachment Act declares that the assessment and penalty imposed under it shall be "deemed to be land revenue". In regard to the expression "deemed to be", in *The Queen* v. *The County Council of Norfolk*,[1] Cave, J., observed: "Generally speaking when you talk of a thing being deemed to be something you do not mean to say that it is that which it is deemed to be. It is rather an admission that it is not what it is deemed to be, and that notwithstanding it is not that particular thing nevertheless *for the purposes of the Act*, it is to be deemed to be that thing". See also *Leitch* v. *Emmot*.[2] Lord Dunedin's observations in *The Commissioner of Income-tax, Bombay Presidency* v. *Bombay Trust Corporation Ltd.*,[3] are also to a like effect. He said: "When a person is 'deemed to be something', the only meaning possible is that whereas he is not in reality that something, the Act of Parliament requires him to be treated *as if he were.*" In other words the phrase is used to *extend* the application of a provision of law to a class not otherwise amenable to it, see *Ramabhadra Odayar* v. *Gopalaswami Odayar*.[4] Thus the assessment and penalty leviable under the Land Encroachment Act are to be treated as land revenue with all consequences attendant on their recovery and hence the conclusion becomes easy that a sale for realisation of the same would pass the property sold free of incumbrances to the purchaser.

ABDUL RAHAMAN *v.* BALAI PADA SET, I.L.R. (1941) 1 Cal. 137.

This case deals with a question concerning the scope of the bar contained in O. 22, r. 9 of the Civil Procedure Code. It declares that where during the pendency of a suit instituted by a

1. (1891) 60 L.J., Q.B. 379.
2. (1929) 2 K.B. 236.
3. (1929) 58 M.L.J. 197: I.L.R. 54 Bom. 216, 223: L.R. 57 I.A. 49 (P.C.).
4. (1930) 59 M.L.J. 782.

widow on a mortgage executed in her deceased husband's favour, the widow dies, the next reversioner should seek substitution in her place within the period allowed by law and that failure to do so will bar a fresh suit on the mortgage. A suit may abate either because the right to sue does not survive or because even if it survives the legal representative has not been brought on record within the prescribed time. The former arises under the general law and the latter under O. 22 of the Code of Civil Procedure. Naturally where the right to sue does not survive O. 22 has no application. In the case of a suit by a Hindu widow, whether the right to sue survives depends upon the character in which she brings the suit. If it was not for the establishment of any right personal to the widow but as representing her husband's estate, the right to sue will survive. It is well settled that though a Hindu widow takes only a qualified interest in her husband's estate she fully represents that estate and the succeeding heirs would be bound by a decree fairly and properly obtained against her, *Katama Nachiar* v. *Raja of Shivagunga*.[1] Since the right to sue survives, where she sues as representing the estate the question will be whether the reversioners could be deemed to be her legal representatives for continuing the action on her death. No doubt under the English law the primary meaning of the term "legal representative" is "executor or administrator"—see *Price* v. *Strange*[2]—but the definition in S. 2 (11) of the C. P. Code is admittedly wider. As stated by Mitra, J., in *Amar Chandra Kundu* v. *Sebak Chand Choudhury*[3]: "The expression 'legal representative' as used in the Code of Civil Procedure is not confined to the heir, executor or administrator of a deceased person. It has been held to include a person, who though not as heir, executor or administrator holds an estate in other capacities, such as a son adopted by a widow in relation to the widow or a reversioner taking an estate after the death of a widow or daughter in possession as an heiress if the debt covered by the decree against the widow or daughter was incurred for the necessary purposes of the estate held by her." It has, however, been suggested—see *Lachhman* v. *Bansi*[4]—that the bar of O. 22, r. 9 can operate on failure by the legal representatives to get themselves substituted in the place of the deceased only where "the *deceased's* right to sue survives" and not otherwise. The distinction between a case where a "deceased's right to sue survives" and a case where "the right to sue survives" is with great respect not to be found in the C. P. Code. The language of O. 22 is general and r. 1 speaks only of the survival of the right to sue. If a plaintiff dies he cannot possess any right and the surviving right is in no sense the deceased's right to sue. What survives is the right of suit and it attaches

1. (1863) 9 Moo.I.A. 539.
2. (1820) 6 Maddison 159.
3. (1907) I.L.R. 34 Cal. 642.
4. (1930) I.L.R. 12 Lah. 275.

to the person who becomes in law entitled to enforce the claim on which the suit is based. Hence where the deceased had sued in a representative character the right passes to the person who in law would represent the estate. In *Venkatanarayana Pillai* v. *Subbammal*,[1] in allowing the substitution of one reversioner in place of another who died pending a suit instituted by him for a declaration of the invalidity of certain alienations by a widow, the Privy Council remarked: "The phraseology of sub-S. 11 (of S. 2, C. P. Code) in their Lordships' opinion, is fairly open to the contention that the suit was brought by the deceased plaintiff as representing in his reversionary right the estate of the last male owner; and that on his death such right devolved on the petitioner. Their Lordships added: "If the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's action, it follows that on his death the 'next presumable reversioner' is entitled to *continue the suit* begun by him. Their Lordships are of opinion that in this case the right to sue survives and that the petitioner is clearly entitled to the order asked for." It is true that the Privy Council allowed the substitution on the ground that the reversioner concerned could have been a co-plaintiff in the action under O. 1, r. 1, but the decision leaves no room for doubt that the petitioner would be entitled to substitution also on the ground that the right to sue survived. Hence on the death pending the suit of a limited owner who had sued as representing the estate of the full owner the nearest reversioner should get himself substituted. In *Prenmoyi Choudhrani* v. *Preonath Dhur*,[2] it was thus remarked: "Ishwari Dassi did not bring the suit on any cause of action personal to herself only. She sued as representing her husband's estate; and the property, if recovered, would continue to appertain to that estate, and would on her death, go with the rest of it to the succeeding heirs. These heirs, although they do not claim through her are . . . . for the purposes of the suit her legal representatives . . . and if the right to sue survives as we think it undoubtedly does survive, they are the only persons who can proceed with the suit." This line of reasoning has been adopted in almost all subsequent cases, see *Ramaswami* v. *Pedamunayya*,[3] *Jadubansi Kunwar* v. *Mahpal Singh*.[4] The view in the instant decision is in accord with these authorities and the contrary opinion to be found in *Lachhman* v. *Bansi*[5] finds little support either in the code or under the authorities. In fact, in the last mentioned case Bhide, J., himself recognises: "There is no doubt that a suit of this type is of a representative character, but the question whether an abatement binds all reversioners in such a case is not free from difficulty." He was however against applying the bar of O. 22, r. 9 on the ground "that the aforesaid rule

1. (1913) 28 M.L.J. 535: I.L.R. 38 Mad. 406: L.R. 42 I.A. 125 (P.C.).
2. (1896) I.L.R. 23 Cal. 636.
3. (1914) I.L.R. 39 Mad. 382.
4. (1915) I.L.R. 38 All. 111.
5. (1930) I.L.R. 12 Lah. 275.

being a disabling one should be strictly construed." The other reason that O. 22 is really confined to the question of the continuance of the suit by virtue of the devolution of the *deceased's* right to sue on other persons during the pendency of the suit has as already stated no basis in the Code.

AMULYA MOHAN BASAK *v.* MOINUDDIN, I.L.R. (1941) 1 Cal. 318.

This case deals with an interesting question of insolvency law which seems to be more or less a matter of first impression. It holds that where a debtor applying to be adjudicated as insolvent satisfies the conditions laid down in that behalf by the Presidency Towns Insolvency Act, he is entitled to an order of adjudication notwithstanding that that person is a disqualified proprietor and his estate is under the superintendence of the Court of Wards. S. 11 of the Presidency Towns Insolvency Act specifies the restrictions on the jurisdiction of the Court to make an order of adjudication and S. 14 states the conditions on which a debtor may present an insolvency petition. There is nothing in the sections to suggest the exclusion of a debtor who is a ward of Court from seeking the benefits of the Act. Adjudication being a matter involving a change of status, the primary condition that should be satisfied by every debtor applying to be adjudged insolvent is that he should have the *capacity* to commit the act of insolvency. Where the capacity exists, the right to an order of adjudication on the conditions prescribed by S. 14 being present is a statutory right and not a matter resting on the Court's discretion, *Chhatrapat Singh Dugar* v. *Kharag Singh*.[1] The order shall then be available as a matter of course, *Re*: *Gopaldas Aurora*.[2]

It is true that the purposes of the Insolvency Acts which are enactments of the Central Legislature are wider than those of the Court of Wards Acts in the different provinces which are matters of provincial legislation only, and the provisions of the former are in a general sense paramount. Also to equate a disqualified proprietor with a minor or a lunatic in regard to his legal capacity may not be justifiable, *The Raja of Vizianagaram* v. *The Secretary of State for India in Council*.[3] The question will really be how far a disqualified proprietor becomes legally incapacitated. Section 6 of the Bengal Court of Wards Act declares the disqualification to be to "manage" his property. Section 7 authorises the Court of Wards to take charge of all the properties of the person. Section 10 (*c*) enjoins a bar against the execution of any decree or order against the person or property of the ward subject to certain conditions; *see also* S. 64-A. Section 51 recognises the capacity of a ward to institute suits subject to certain formalities being complied with and S. 60 lays down that a ward cannot create without the sanction of the

1. (1916) 32 M.L.J. 1: I.L.R. 44 Cal. 535: L.R. 44 I.A. 11 (P.C.).
2. (1925) 30 C.W.N. 173.
3. (1936) 71 M.L.J. 873.

Court of Wards any charge upon or interest in his property. The corresponding provision in the Madras Act, S. 34 (1) (*a*), is somewhat wider and declares that "a ward shall not be competent to transfer or create any charge on or interest in any part of his property or to enter into any contract or to make any acknowledgment involving him in pecuniary liability personally or in respect of such property. Dealing with the extent of the incapacity of a ward under the Oudh Land Revenue Act of 1876, the Privy Council said: "From a perusal of the group of sections above referred to, their Lordships are of opinion, that it was not intended to interfere with the personal status or rights of an adult disqualified proprietor who is neither idiot nor lunatic, except as regards the management of his property or anything expressly prohibited," *Dhanipal Das* v. *Maneshar Baksh Singh.*[1] A disqualified proprietor will not thus be under any disability regarding property of which he is a trustee, *Sri Thakurji* v. *Hira Lal.*[2] Where a ward is a hereditary trustee, then under the Madras Court of Wards Act it will be for the Court of Wards to arrange for the discharge of the ward's duties as trustee, *see* S. 63 of Madras Act I of 1902. A disqualified proprietor is not precluded from entering into a contract of marriage but no adoption by him will be valid except when made with the consent of the Provincial Government—*see* S. 61 of the Bengal Act. The language of the corresponding section in Madras, S. 34, cl. (*c*) is: "a ward shall not be competent to adopt except with the consent of the Court of Wards", with a rider that the Court shall not withhold its consent except for certain reasons. This has been construed to mean that consent to an adoption is not to be ordinarily refused, see *The Raja of Vizianagaram* v. *The Secretary of State for India in Council.*[3] In the Bengal Act there is seemingly nothing to suggest that the consent of the Provincial Government is not to be ordinarily withheld. But the provision permitting the obtaining of such consent *ex post facto* shows that permission would be accorded normally; otherwise the repercussions will be serious as adoption affects status. If the conclusion is right that the capacity to adopt is not destroyed by a person becoming a ward of Court, it will follow that the disqualification operates only to 'managing' the property or dealing with the property directly. Adoption is the appointment of an heir to one's property in the ultimate analysis, and if property can be affected by the operation of law consequent on adoption it should be equally unobjectionable if property with the Court of Wards gets indirectly affected by any other act of the disqualified pro-

1. (1906) 16 M.L.J. 292 : L.R. 33 I.A. 118 : I.L.R. 28 All. 570, 580 (P.C.).
2. (1922) I.L.R. 44 All. 634.
3. (1936) 71 M.L.J. 873.

prietor; such as the filing of an insolvency petition. It would thus appear that the view propounded in the instant decision is in no way against the policy of the Bengal Court of Wards Act. Whether a similar conclusion will be justified under the Madras Act is doubtful having regard to the language of S. 34 (*a*) which prohibits a ward from entering into any contract or making any acknowledgment involving him in a pecuniary liability. Signing a schedule in insolvency proceedings is to make such acknowledgment and hence it looks as if under the Madras Act a disqualified proprietor cannot file an application for being adjudicated insolvent.

AKINA BIBI *v.* MUHAMMAD ALI SHAHA, I.L.R. (1941) 1 Cal. 405.

An important question of practice, namely, whether a decree involving fraud upon the Court can be vacated on application under S. 151 of the Code of Civil Procedure, which ordinarily will not apply when there is another remedy available, was answered in the affirmative in this case. A suit for partition had been brought resulting in a decree on the basis of a *solenama* purporting to settle the matter amicably. Later on, an application was preferred to the trial Court to set aside the decree on the allegation, that the suit had been instituted with the petitioner and certain others as plaintiffs without their knowledge, that the *solenama* was also false and without their knowledge and that the decree had been fraudulently procured. Under the English practice, according to Lord Cottenham, where an impeached decree is so very defective that the Court treats it as a nullity it may *possibly* be got rid of by *motion*, see *Morrison* v. *Morrison*.[1] In *Flower* v. *Lloyd*,[2] after a final judgment had been obtained in the Court of Appeal dismissing an action with costs, the plaintiff sought by motion in that Court for leave for a rehearing of the appeal on the ground of subsequent discovery of facts showing that the order of the Court of Appeal had been obtained by a fraud practised on the Court below. In refusing leave Jessel, M.R., stated: "If there were no other remedy I should be disposed to think that the relief now asked ought to be granted, for I should be slow to believe that there were no means whatever of rectifying such a miscarriage if it took place; but I am satisfied that there is another remedy." The principle of that case has been held to be equally applicable in India and that it is only by a suit brought for that purpose or by way of a review that the decree should be vacated—see *Mirali Rahimbhoy* v. *Rahimbhoy Habibbhoy*,[3] *Fatmabai* v. *Sonbai*.[4] In the latter

1. (1833) 4 M. & C. 215.
2. (1877) 6 Ch.D. 297.
3. (1891) I.L.R. 15 Bom. 594.
4. (1911) I.L.R. 36 Bom. 77.

case it was stated: "A consent decree once duly obtained cannot be set aside by a rule, but if it is sought to impeach it upon grounds of fraud, that must be done in a regular suit. The only alternative which the law allows is an application for review of "judgment". The fraud alleged in that case was a fraud on the Court, namely, that the warrant authorising the Attorney to defend the suit on behalf of the third defendant was forged. In the instant decision Henderson, J., remarked: "If the matter was *res integra,* I should find it very difficult to hold that these cases ought to be an exception to the general rule. The remedy by suit....remains, and in my judgment, it is the most appropriate remedy. In all these cases it is an important question of fact if fraud has been committed or not, and a suit provides the most satisfactory procedure for investigating such facts". There were however decisions of the Calcutta High Court holding that a decree obtained by fraud on the Court can be set aside on application under S. 151, Code of Civil Procedure—see *Peary Chowdhury* v. *Sonoo Dass,*[1] *Suresh Chandra Sen* v. *Jogesh Chandra Sen.*[2] The same view had been taken in Patna—see *Sadho Saran Rai* v. *Anant Rai,*[3] *Sheodhar Prasad Singh* v. *Ramdeo Prasad Singh;*[4] in Madras—see *Vilakathala Raman* v. *Vayalil Pachu;*[5] and in some decisions of the Bombay High Court, *Basangowda* v. *Churchigirigowda.*[6] In the Bombay case remedy through an application was held available apart from any provision of the Civil Procedure Code. The Court observed: "The result has been that there has been fraud committed upon the Court. The Court was persuaded to sign a decree to which the defendant had never consented and that upon the representation that he had consented to it. Therefore once the Court is asked to go back upon its own procedure, it is not a question whether there is any section in the Civil Procedure Code to warrant the action of the Court amending its proceedings. It is an inherent power of every Court to correct its own proceedings where it has been misled".

In view of the English practice being different and the absence of uniformity in judicial opinion in India, an authoritative pronouncement by the Judcial Committee on this matter will be desirable.

SUBODH CHANDRA NAG *v.* K. L. BANK, LTD., I.L.R. (1941) 1 Cal. 429.

It is held in this case that in a suit to enforce a simple mortgage the equity of redemption is not to be regarded as the

1. (1914) 19 C.W.N. 419.
2. (1939) 43 C.W.N. 969.
3. (1923) I.L.R. 2 Pat. 731.
4. (1933) I.L.R. 13 Pat. 165.
5. (1914) 27 M.L.J. 172.
6. (1910) I.L.R. 34 Bom. 408.

subject-matter of the suit and that when a decree results in such a suit the defendant cannot file an appeal as a pauper under O. 44, r. 1 of the Code of Civil Procedure unless the value of the equity of redemption is set out and taken into consideration. In a simple mortgage the mortgagor is in possession and enjoyment of the mortgaged property and the equity of redemption is certainly worth something. Even where a suit is one for redemption by the mortgagor the Allahabad High Court has held in *Kapildeo Singh* v. *Ram Rikha Singh*,[1] that the plaintiff cannot ask for leave to sue *in forma pauperis* so long as he can raise money on the equity of redemption. This view has been dissented from in Madras and it has been held that the equity of redemption is itself the subject-matter in suit in such cases, *Sekharan* v. *Eacharan*.[2] In *Manicka Chetty* v. *Narayanaswami Naidu*,[3] it was stated that there can be no doubt that the subject-matter of a mortgagor's suit for redemption is his right to redeem or his equity of redemption and therefore its value should be excluded in determining whether its owner is a pauper. In Nagpur and Lahore the view is held that the Allahabad ruling cannot apply where the mortgagor is not in possession of the property, *see Chunni Lal* v. *Gulzari Lal*,[4] *Baston* v. *Nawab of Bahawalpur*.[5] Whatever may be the position in regard to a suit for redemption, the case of a suit to enforce a simple mortgage stands on a different footing. The equity of redemption is only indirectly involved. It is possible that in execution of the decree for sale the property might be lost to the mortgagor. This however is not an inevitable consequence but depends on the act or default of the mortgagor in the matter of satisfying the decree. In *Durga Prasad* v. *Srinivas*,[6] where the facts were similar to those in the decision under review, the Patna High Court held that the value of the equity of redemption cannot be excluded by the Court in considering the application by the defendant for leave to appeal *in forma pauperis*, and that the value thereof should therefore be stated. The decision under notice has followed this view.

[END OF VOLUME, 1941—II.]

1. (1910) I.L.R. 33 All. 237.
2. (1910) 3 I.C. 459.
3. (1933) 65 M.L.J. 277 : I.L.R. 57 Mad. 82.
4. A.I.R. 1924 Nag. 44.
5. A.I.R. 1933 Lah. 528.
6. A.I.R. 1930 Pat. 368.

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NOTES OF RECENT CASES

The Chief Justice and Mockett, J. National Insurance Company Ltd. v. Visweswara Rao and another.
28th April, 1941. **O.S.A. No. 23 of 1940.**

Interest—Loan on a mortgage of lands and a life insurance policy—Nine per cent. per annum compound interest with quarterly rests—Whether too high.

An insurance company advanced a sum of Rs. 6,000 secured by a mortgage of certain lands and a policy of insurance on the life of the mortgagor. The contract stipulated that interest should be at 9 per cent. per annum compound with quarterly rests. The suit on the mortgage was not defended. The trial Judge (*Somayya, J.*) refused to allow more than 6¼ per cent. compound interest. On appeal,

Held, that nine per cent. compound interest was not so high as to justify the Court in reducing it especially when the borrower did not complain.

S. Parthasarathy and *V. K. Tiruvenkatachari* for Appellant.

Respondent not represented.

K.S.

The Chief Justice and Mockett, J. Venkayya v. Raghavamma.
29th April, 1941. **A.A.A. O. No. 261 of 1940.**

Husband and wife—Decree for maintenance in favour of wife—Executability of, after subsequent cohabitation—Civil Procedure Code (V of 1908), O. 21, r. 2—Discharge of decree—Provisions for—Applicability.

Though a Hindu wife may not sue for judicial separation she can if she is compelled to live apart sue for and obtain a decree directing her husband to maintain her. A decree obtained by a Hindu wife against her husband for maintenance differs in no important respect from an order for permanent alimony embodied in a decree for judicial separation. Where the wife resumes cohabitation after obtaining the maintenance decree, the decree is annulled by reason of the subsequent resumption of cohabitation and therefore the wife cannot execute the decree.

English and Indian authorities reviewed.

Haddon v. *Haddon*, L. R. 18 Q.B.D. 778, applied. I.L.R. 2 Rang. 163, followed.

It is not a question of procedure or adjustment or satisfaction of the decree. The question is whether the Court is to enforce a decree the basis of which has, by the action of the parties themselves, been demolished.

A. Lakshmayya for Appellant.

K. Kotayya for Respondent.

K.S.

Pandrang Row, J. Rajammal *v.* Chakrapani Chetti.
2nd May, 1941. **C.R.P. No. 1153 of 1940.**

Jurisdiction—Suit for declaration that mortgage document is void and not binding on plaintiff—Value for purposes of jurisdiction.

In a suit for a declaration that a mortgage is not binding, there is no reason why a different valuation should be adopted for jurisdiction from what would be adopted in a suit for cancellation. The face value alone of the document should be taken as the value and the fact that interest has accrued, increasing the amount due under the document is immaterial.

C. Padmanabha Aiyangar for Petitioner.

M. S. Venkatarama Aiyar for Respondent.

K.S.

Patanjali Sastri, J. Kotayya *v.* Ramakotayya and another.
2nd May, 1941. **C.R.P. No. 1659 of 1937.**

Provincial Insolvency Act (V of 1920), *S.* 28 (5)*—Agriculturist's properties—Exemption from vesting—Test—Material date.*

The question for determination in claims for exemption under S. 28 (5) of the Provincial Insolvency Act is whether the insolvent was an "agriculturist" at the time of the adjudication when the vesting is to take place and not the time of the enquiry into the application.

P. Satyanarayana Rao for Petitioner.

V. Rangachari for Respondent.

K.S.

Burn, J. Venkatarama Iyer *v.* Samayan.
25th April, 1941. **C.R.P. No. 1215 of 1940.**

Practice—Vakalat—New receiver—Necessity to bring himself on record and file fresh vakalat.

It is obligatory upon a new receiver to get himself brought on record in place of the former receiver (28 Mad. 15). This cannot be done by substituting his name in the vakalat executed by his predecessor. The engagement made by the former receiver must be treated as having come to an end with his discharge and the new receiver must engage his vakil afresh.

J. Subbuswami for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S.

Horwill, J. Rabiyath *v.* Mayankutty.
1*st May,* 1941. **C.R.P. No. 352 of 1939.**

Limitation—Acknowledgment of liability—What amounts to.

A statement by the defendant in a letter to the plaintiff (the deceased's legal representative) saying that "a sum of Rs. 964-4-10 was lying as balance to his (deceased's) credit in our accounts at the time of his death" is not a present acknowledgment of an outstanding debt.

Case-law discussed.

B. Pocker for Petitioner.

K. P. Ramakrishna Aiyar for Respondents.

K.S.

Wadsworth, J. Chinnammal *v.* Sundara Rao.
2*nd May,* 1941. **C.R.P. No. 2472 of 1939.**

Civil Procedure Code (*V of* 1908), *O.* 34, *r.* 1*—Scope.*

When in a suit by an assignee of a mortgage from the trustee under the mortgagee's will, the mortgagor sets up the title of the mortgagee's heir and the latter repudiates the will and claims to be impleaded, the Court is bound under O. 34, r. 1, C. P. Code, to implead the heir and decide who is entitled to the mortgage debt and who can give a valid discharge to the mortgagor.

T. S. Vaidyanatha Aiyar for Petitioner.

U. S. Ramaswami Aiyar for Respondent.

K.S.

Horwill, J. Syed Muhammad *v.* The Donation Union Link of Railways.
2*nd May,* 1941. **C.R.P. No. 1270 of 1939.**

Contract Act (*IX of* 1872), *S.* 74*—Applicability.*

One of the rules relating to a Mutual Benefit Society provided that: "A member who fails to pay his subscription by the last day of the month for which it is due shall be regarded as a defaulter. As such, he shall be allowed two months of grace for payment of arrears of subscriptions and if by the end of the second month of grace, no payment is received he shall cease to be a member of the Link and he shall forfeit all rights and claims on the society." Plaintiff having committed a breach of contract, asked for the return of the money paid in by him contending that the provision for forfeiture was a penalty within the meaning of S. 74 of the Contract Act.

Held, that S. 74 has no application to the case. S. 74 deals with cases in which a person stipulates that upon breach of contract by him, he will pay something to the innocent party of the contract. In such cases, the party aggrieved is entitled by way of damages to receive an amount not exceeding that stipulated by way of penalty. But the money paid in by the plaintiff ceased to be his as soon as he paid it to the society and he cannot recover it. To allow him to recover will be giving him compensation for the loss that has accrued to him through his breach of contract and not relief against a harsh penalty.

S. K. Ahmed Meeran for Petitioner.

C. Krishnaswami Aiyar for *Messrs. King and Partridge* Solicitors for Respondent.

K.S.

Wadsworth and Somayya, JJ.
23*rd June*, 1941.

Kandappa Goundan, Accused.
Crl. App. No. 143 of 1941.
and Crl. R. C. No. 28 of 1941
(Crl.R.P. No. 266 of 1941).

Criminal Trial—Offence of murder—Motive sexual jealousy—How far ground for awarding lesser sentence.

King-Emperor v. *Dinabandu Mitra*, (1 Cr.L.J. 62) is not an authority for the proposition that when the motive for a brutal murder is sexual jealousy the lesser sentence should ordinarily suffice. The question whether there are grounds for imposing the extreme penalty must depend on the facts of each case. It cannot be said that the mere existence of the sexual motive is automatically sufficient to render the death penalty unsuitable. The judges have upon them a duty to study the facts and arrive at the difficult and responsible decision as to the propriety of the lesser punishment.

M. Santosh for the Accused.

Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Wadsworth, J.
8*th July*, 1941.

Janab Abdul Razak Sahib, Mutavali *v.*
Narayanaswami and others.
Crl. R. C. No. 517 of 1941
and Crl. R. P. No. 487 of 1941.

Criminal Procedure Code (V of 1898), S. 144—Civil Court seized of matter declining to restrain owner of property constructing building—Order under S. 144, Cr. P. Code by magistrate—Propriety.

Where the Civil Court which is seized of the matter has declined to restrain the owner of property from constructing a building thereon, merely because of an apprehension regarding the future use of that building, it is improper in the absence of any real emergency for the magistracy to fall back on S. 144, Cr. P. Code and nullify the effect of the Civil Court's order.

B. Pocker for Petitioner.

Public Prosecutor (*V. L. Ethiraj*) for the Crown.

Respondents not represented.

K.S.

The Chief Justice and Chandrasekhara Aiyar, J. *16th July, 1941.*

Siddamullana *v.* Pompanna Setty and Debt Conciliation Board, Adoni.

C.M.P. No. 7313 of 1940.

Madras Debt Conciliation Act (XI of 1936), S. 3 (4)—Disagreement between members of the Board—Right of chairman to decide by his casting vote.

The petitioner's debt was declared discharged under S. 10 (2) of the Debt Conciliation Act on the ground that he had not complied with the notice served upon him under S. 10 (1). The chairman of the Board held that he had been served and in consequence his debt should be declared discharged under S. 10 (2). One of the other two members of the Board considered that there was a doubt whether the petitioner had been served and he was in favour of giving him the benefit of it. The third member refused to give any decision and left the meeting. Thereupon the chairman gave his casting vote against the petitioner.

Held, in a petition to quash the proceedings, that in the circumstances it cannot be said that the chairman's decision was an arbitrary one, nor can it be said that he had acted contrary to law. The fact that there was disagreement between him and the other members of the Board who remained to decide the case, gave the chairman the right of finally deciding the matter [S. 3 (4)]. The Court cannot issue a *writ of certiorari* as there has been no arbitrary or unlawful action.

K. Srinivasa Rao for Petitioner.

A. Gopalacharlu for 1st Respondent.

The Government Pleader (*K. Kuttikrishna Menon*) on behalf of the Board.

K.S.

Horwill, J. *16th July, 1941.*

Yelumalai Chetti, Accused.

Crl.R.C. No. 1 of 1941
Crl. R.P. No. 1 of 1941.

Madras Gaming Act (III of 1930), Ss. 3 and 4—House in which betting on horse race takes place—If 'common gaming house' under S. 3—Paraphernalia of betting found in the house—How far evidence.

No doubt the main part of S. 3 reads as if it did not apply to horse racing, because it refers to a "room or place in which cards, dice, tables or other instruments of gaming are kept or used", such expressions being hardly applicable to the slips drawn in connection with betting on horse racing. But the second paragraph of that section says " 'gaming' includes wagering or betting on a horse race".

Accordingly, a house in which wagering or betting on horse race takes place is a common gaming house. It cannot be said that the wording of Ss. 4 (*i*) and 4 (*ii*) makes it impossible to apply the definition of a common gaming house to a house in which such wagering or betting on horse race takes place. S. 6 enables a Court to take as evidence of a building being a common gaming house the mere fact that the paraphernalia (betting slips, etc.) of betting were found in it.

T. R. Venkatarama Sastri, F. S. Vaz, K. Seshagiri Rao Naidu and *N. Krishnamurthi* for Petitioner.

The Public Prosecutor (*V.L. Ethiraj*) for the Crown.

K.S.

N.R.C.

Horwill, J. Venkataraghava Aiyar, Accused.
16th July, 1941. **Crl. R.C. No. 161 of 1941.**
Crl. R.P. No. 154 of 1941.

Madras Local Boards Act (XIV of 1920), *Ss.* 193 *and* 207—*Storing and selling firewood within Panchayat Board limits—No licence necessary.*

Schedule VII of the Local Boards Act, unlike Sch. VI of the City Municipal Act, does not require that a licence should be taken out for storing firewood. Accordingly where a person failed to obtain a licence for storing and selling firewood during the year 1939-40 within the limits of a Panchayat Board, he has committed no offence in storing firewood.

Quaere.—Whether he could sell firewood without a licence and by doing so exercised a trade.

K. V. Ramachandra Aiyar for Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Somayya, J. Mahamad Ebrahim *v.* Allapichai Rowther.
16th July, 1941. **S.A. No. 578 of 1938.**

Civil Procedure Code (V of 1908), *S.* 13—Ex parte *decision of foreign Court—When one on merits.*

A decision of the Penang Court passed *ex parte* but on proof of the plaintiff's claim according to the procedure of that Court is a judgment on the merits within the meaning of the term as used in S. 13 of the Civil Procedure Code. 50 Mad. 261, followed.

K. V. Srinivasa Aiyar for Appellant.

C. S. Venkatachariar and *D. Ramaswamy Aiyangar* for Respondent.

K.S.

Wadsworth, J. Raja V. Maheswara Rao
16th July, 1941. *v.* Narasimha Rao.
C.R.P. No. 475 of 1941.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 3 (*i*)—*Re-united Hindu family—If undivided Hindu family for purposes of S.* 3 (i) *of Act IV of* 1938.

A reunited Hindu family is for the purpose of S. 3 of Madras Act IV of 1938 an undivided Hindu family.

The Advocate-General (*Sir A. Krishnaswami Aiyar*), *B. C. Seshachala Aiyar* and *C. Krishna Reddy* for Petitioner.

Ch. Raghava Rao for Respondent.

K.S.

Venkataramana Rao, J. M.H.H. Madrasa School *v.*
16th July, 1941. Municipal Council, Tiruvarur.
S.A. No. 1125 of 1940.

Madras District Municipalities Act (V of 1920), *S.* 267-A—*Owner of private market in a municipality—Whether entitled to prevent the municipality from opening a new market.*

All that S. 267-A of the Madras District Municipalities Act says is that it is open to a Municipal Council to acquire the rights of any person to hold a private market. That does not confer any right on the owner of a private market to compel the municipality to acquire his right and not open a new market. The English common law rule that the owner of a private market can prevent another market being opened within a radius of 6 2|3 miles, is an artificial rule and is not countenanced even in England as

being a sound one. It is not a rule which is based on any equity or principles of good conscience which the Courts are compelled to adopt in India. There is no such thing as a market franchise or a right to hold a market conferred by grant from the Crown in India.

47 Cal. 1079, relied on.

K. Rajah Aiyar, and *K. S. Desikan* for Appellant.

S. Muthiah Mudaliar for Respondent.

K.S.

Somayya, J. Avana Mana *v.* Maria Kutti Umma.
17th July, 1941. **S.A. No. 586 of 1938.**

Transfer of Property Act (IV of 1882), S. 59—Rule as to attestation of mortgage—If applicable to registered hypothecation bond of a fund in Court.

On a question whether a registered bond hypothecating a fund in Court executed by the first defendant, but not properly attested, operated as a valid hypothecation,

Held, that the provision regarding attestation in S. 59 of the Transfer of Property Act was not applicable to a case of hypothecation of movables and therefore the bond operated as a valid hypothecation of the fund in Court.

N. R. Sesha Aiyar for Appellant.

B. Pocker for Respondent reporting no instruction.

K.S.

The Chief Justice and Venugopala Mudaliar *v.*
Chandrasekhara Aiyar, J. Ekambara Naidu.
18th July, 1941. **O.S.A. No. 4 of 1941.**

Madras High Court Original Side Rules, O. XLV, r. 7, cl. (d)—Scope and applicability.

Before an order under cl. (*d*) of r. 1 of O. 45, Original Side Rules, to pay into Court moneys in the hands of executors, etc., it must be admitted by the executors, administrators or trustees that they have money actually in their hands. Clause (*d*) of r. 1 of O. 45 does not refer to moneys which ought to be in their hands but only says that an originating summons may be taken out under its provisions for an order directing payment into Court of moneys *in the hands* of executors, administrators or trustees.

N. Panchanatha Aiyar for Appellant.

V. Sundararajan for Respondent.

K.S.

Chandrasekhara Aiyar J. Venkatasubbiah *v.*
18th July, 1941. Venkatasubbiah
C.R.P. No. 1185 of 1939.

Practice—Suit of small cause nature numbered and tried as an original suit as the presiding District Munsif had no small cause jurisdiction—Appealability of decree in such suit.

A suit in a District Munsif's Court was filed originally on the small cause side as it ought to have been but was later tried as an original suit as the District Munsif who happened to try it had no small cause powers and could not try it except as an original suit. In a revision petition, on the question whether an appeal could lie from such a decree,

Held, that such decree was appealable. 69 M.L.J. 443, distinguished.

N. Vasudeva Rao for Petitioner.

Kasturi Seshagiri Rao for Respondent.

K.S.

Venkataramana Rao, J. Ramanathan Chettiar *v.*
21*st July*, 1941. Sri Ramaswami Bank, Ltd.
A.A.A.O. No. 3 of 1940.

Civil Procedure Code (V of 1908), O. 21, r. 90, Proviso—Intra vires.

Proviso 2 to O. 21, r. 90, Civil Procedure Code (Madras), is not *ultra vires* the rule-making powers of the High Court.

K. S. Ramabhadra Aiyar for Appellant.

B. V. Viswanatha Aiyar for Respondent.

K.S.

Gentle, J. Chinoy *v.* Chinoy.
25*th July*, 1941.
Application No. 1360 of 1941 in O.M.S. No. 3 of 1941.

Parsi Marriage and Divorce Act (III of 1936), S. 47-B—Leave to sue obtained on the Original Side of the Madras High Court—Revocation of leave, how to be sought—Remedy is by way of appeal only as provided by S. 47-B of the Act and not by application under the Original Side Rules—Rules inconsistent with the Parsi Marriage and Divorce Act, not applicable to cases under the Act.

Where leave to sue on the Original Side of the High Court has been obtained in a Parsi Matrimonial Suit, the remedy of the party insisting to have such leave set aside is by way of appeal as provided in S. 47-B of Act III of 1936 and not by way of an application to revoke the leave granted, under the Original Side rules.

Though under the earlier Parsi Marriage and Divorce Act, XV of 1865 there was a provision enabling the High Court to frame rules of procedure for cases coming under the Act there is no such provision in the present Act III of 1936 and the provisions of the latter Act alone would apply and the rules of the Original Side cannot be availed of if inconsistent with the provisions of that Act.

S. V. B. Row for Applicant (Defendant).

C. R. Pattabhiraman and *C. V. Nilakantan* for Respondent (Plaintiff).

K.S.

Venkataramana Rao, J. Muniappa Mudaliar *v.*
25*th July*, 1941. Kuppuswami Mudaliar.
S.A. No. 784 of 1940.

Hindu Law—Maintenance—Adult illegitimate son—If entitled to claim maintenance from putative father personally.

Under the Hindu Law a putative father who does not possess any joint family or ancestral properties is under no personal obligation to maintain his adult illegitimate son. An illegitimate son cannot claim any higher rights regarding maintenance than a legitimate son.

M. Chelva Aiyangar for Appellant.

M. Natesa Aiyar for *V. Ramaswami Aiyar* for Respondent.

K.S.

Wadsworth, J.
16th July, 1941.

Krishna Menon *v.* Kunjandi.
C.R.P. No. 1448 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 15—Scope—Mortgage by jenmi with possession and a lease, back of the property to jenmi—Rent payable by, is not "interest"—Mortgagee whether "intermediary"—Right of mortgagor-lessee to relief in respect of arrears of rent.

In the case of a mortgage with possession and a contemporaneous lease back the "rent" payable is not "interest" so far as Act IV of 1938 is concerned. The lease although contemporaneous with and closely related to the mortgage must be regarded as a lease and the payment thereunder must be regarded as rent. (1940) 2 M.L.J. 760.

Such a mortgagee leasing back the properties has an interest entitling him to possession of the land which he has transferred to another, namely, the jenmi himself. The mortgagee is therefore an "intermediary" as defined by the Malabar Tenancy Act. The "rent" payable to the mortgagee therefore falls within S. 15 of Madras Act IV of 1938 and the mortgagor jenmi is entitled to relief under that section if he has made the required deposit within the time laid down in the Act.

P. Govinda Menon for Petitioner.

A. K. Pavitran for Respondent.

K.S.

Venkataramana Rao, J.
16th July, 1941.

Pethaperumal Chettiar *v.* Veluchami Pillai and another.
S.A. No. 879 of 1939.

Madras Estates Land Act (I of 1908), S. 77—Right to recover rent—Failure to exercise—If confers on the ryot the right to melwaram.

Once when it is declared in a suit that the defendants were the ryots in possession of the *kudiwaram* interest and not entitled to the *melwaram* interest, the mere non-collection of rent by the landlord would not confer adverse title on the ryots. Accordingly where a suit is brought within twelve years, from the date on which the legal relationship was declared by the prior judgment, for the recovery of rent for three years prior to the suit, no question of adverse possession arises as to the *melwaram.*

P. S. Sarangapani Aiyangar for Appellant.

R. Narasimhachari for Respondents.

K.S.

Burn and Happell, JJ.
17th July, 1941.

Gangi Reddi *v.* Narasimha Reddi.
C.M.A. No. 179 of 1939.

Provincial Insolvency Act (V of 1920), Ss. 4, 9, 24 and 25—Scope—Petitioning creditor's debt and right to apply for adjudication of debtor as insolvent questioned—Insolvency Court bound to decide the question.

In a creditor's petition for adjudication of the debtor as an insolvent, the debtor disputed the debt of the petitioning creditor and his right to present the petition and the District Court dismissed the petition holding that complicated questions of law and fact arose and in the alleged exercise of its discretion referred the petitioning creditor to a regular suit to establish his debt. On appeal,

Held, that (1) S. 4 of the Provincial Insolvency Act comes into play only after an order of adjudication is passed.

(2) There is no discretion conferred on an Insolvency Court by any of the provisions of the Act to refer a petitioning creditor to a regular suit to establish his right to apply for an order of adjudication.

(3) It is the bounden duty of the Insolvency Court to decide on the right of the petitioning creditor to apply for adjudication, however complicated the question may be.

N R C

59 Bom. 161, dissented from.

Kasturi Seshagiri Rao for Appellant.

V. Govindarajachari and *P. Ramalinga Reddi* for Respondents.

K.S.

Somayya, J. Ittichiri *v.* Appu Menon and others.
18th July, 1941. **S.A. No. 309 of 1938.**

Malabar Tenancy Act (*XIV of* 1930), *S.* 17—*Right of kanomdar to call upon his immediate landlord for renewal—Property belonging to public temple—Madras Hindu Religious Endowments Act* (*II of* 1927), *S.* 76—*Necessity for sanction of lease or mortgage for over* 5 *years—Effect on right of renewal under Malabar Tenancy Act, S.* 17.

Where the kanomdar is entitled to call on his immediate landlord for renewal of his kanom for 12 years, the fact that the properties belong to a public temple cannot affect the right of renewal. The bar enacted in S. 76 of Madras Act II of 1927 cannot apply to the case of a compulsory renewal under S. 19 and Ss. 22 to 25 of the Malabar Tenancy Act.

D. A. Krishna Variar and *Ravi Varma* for Appellant.

P. Govinda Menon and *D. H. Nambudripad* for Respondent.

K.S.

Wadsworth, J. Natesa Naicker *v.* Sambanda Chettiar.
21st July, 1941. **A.A.O. No. 436 of 1940 and C.R.P. No. 491 of 1941.**

Civil Procedure Code (*V of* 1908), *O.* 47, *r.* 1—*Decision overlooking leading authority—How far ground for review.*

The decision in 46 Mad. 955 is not an authority for the view that whenever a Judge has overlooked a ruling he has power to review his decision; nor is it authority for the view that whenever after a judgment has been pronounced a subsequent ruling changes the accepted view of the law, that subsequent ruling can be a ground for review. Where however the legal position is clearly established by a well-known authority and by some unfortunate oversight the Judge has gone wrong by the omission of those concerned to draw his attention to the authority, it may in a proper case be a ground for review coming within the category of an error apparent on the face of the record.

R. Thirumalai Thathachariar and *R. V. V. Thathachariar* for Appellant.

A. K. Muthuswami Aiyar for Respondent.

K.S.

Wadsworth, J. Krishnamurti *v.* Imperial Bank of India at Rajahmundry.
21st July, 1941. **C.R.P. No. 1145 of 1941.**

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 4 (e)—*Debt due to Imperial Bank—Suit on—Agreement by bank to transfer* in futuro *the fruits of the decree to a third person—Debt whether exempted under S.* 4 (e) *of Act IV of* 1938.

Where there is no transfer *in praesenti* of a debt or decree in its favour by the Imperial Bank to a third person but a mere agreement to transfer *in futuro* the fruits of the decree, that debt is one falling within S. 4 (*e*) of Act IV of 1938 and cannot be scaled down.

P. Somasundaram for Petitioner.

O. T. G. Nambiar instructed by *King and Partridge* and *P. V. Vallabhacharyulu* for Respondents.

K.S.

Abdur Rahman, J. Krishnamachariar *v.* Lakshmi Ammal.
23rd July, 1941. **S.A. No. 903 of 1938.**

Madras Land Encroachment Act (III of 1905), S. 6—Assignment of site by Government after cancellation of previous lease to another—Right of assignee to sue previous lessee for possession in Civil Court—Effect of S. 6 of Act, III of 1905.

The defendant was granted a site by the Government on patta on certain conditions. When the defendant failed to comply with those conditions the Revenue Divisional Officer cancelled the assignment and the Tahsildar assigned the site to the plaintiff who then sued the defendant for possession thereof. It was contended by the defendant that the suit was not competent and that it was incumbent on the Government to proceed under S. 6 of Land Encroachment Act, which would give him a right of appeal to the revenue authorities and failing that a right to bring a suit within six months.

Held, S. 6 of the Land Encroachment Act, gives a summary remedy to the Collector but does not take away the right of the Government to proceed in a Civil Court or the right of an assignee from Government to proceed against the previous lessee in a Civil Court. 38 Mad. 674 distinguished. The defendant can have no grievance if he, instead of being compelled to sue in a Civil Court is forced to come to the Civil Court as the defendant in a suit instituted either by the Government or by the Government's assignee.

M. Krishna Bharathi and *S. Annamalai* for Appellant.

S. Ramanujachariar for Respondent.

K.S.

Horwill, J. Sehu Muhammad Maraikayar—Accused.
24th July, 1941. **Crl. R. C. No. 259 of 1941.**
Crl. R. P. No. 245 of 1941.

Madras Local Boards Act (XIV of 1920), S. 229—Uttering offensive abuse against third person on the occasion of a demand for tax being presented to accused by a bill collector—Whether offence under S. 229 of Local Boards Act—"Molest"—Meaning.

The petitioner uttered abusive language against some unnamed persons on the occasion of a demand for tax being presented to him by the complainant, a bill collector of a panchayat board. It was contended by the prosecution that the uttering of offensive abuse amounted to 'molesting' and an offence under S. 229 of the Local Boards Act.

Held, that S. 229 does not make punishable molestation *during* the course of the performance of the duty but only one *in* the performance of the duty, which suggests that the abuse should not merely take place while the person is engaged in his duty, but it must in some way interfere with his work. Where the person abused was not the bill collector but some unnamed person, inimically disposed towards the petitioner, who had given information leading to an exaggerated assessment though a conviction under S. 504, I.P. Code, would have been proper the conviction under S. 229 of the Local Boards Act cannot stand and must be set aside.

S. Ramachandra Aiyar for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Horwill, J. Sudalaimada Kudumban—Accused.
30th July, 1941. **Crl. R. C. No. 367 of 1941.**
Case Referred No. 18 of 1941.

Criminal Procedure Code (V of 1898), S. 349 (1) and (2)—Scope.

A stationary Sub-Magistrate found the accused guilty of an offence under S. 324, I. P. Code, but as he thought that an order under S. 106, Cr.

P. Code, had to be passed against the accused and he had no power to do so himself, he acted under S. 349 (1), Cr. P. Code and submitted the proceedings and forwarded the accused to the Sub-Divisional Magistrate to whom he was immediately subordinate. The joint Magistrate instead of acting under S. 349 (2), Cr. P. Code, considered the proposal of the Sub-Magistrate that proceedings should be taken under S. 106, Cr. P. Code, and came to the conclusion that it was not necessary. He thereupon sent the case back to the Sub-Magistrate for disposal.

Held, that the joint Magistrate was bound to dispose of the case himself, although he was not, of course, obliged to pass an order of the nature considered necessary by the stationary Sub-Magistrate.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

Accused not represented.

K.S.

Horwill, J. Rex. *v.* Jayagopal and others.
30*th July,* 1941. **Cr.R.C. No. 373 of 1941 (Cr.R.P. No. 354 of 1941).**

Madras City Police Act (*III of* 1888); *S.* 47—*Money found in the pockets of persons found to be guilty of betting on horse races in a gaming house—When liable to forfeiture—Principles.*

Under S. 47 of the City Police Act, the Magistrate may order all or any of the articles seized in a gaming house or the proceeds thereof to be forfeited. Money found in the pockets of the persons found guilty of betting on horse races in a premises had also been seized by the police. On the question whether this money ought to be forfeited,

Held, that the general principles to be adopted by a Magistrate in considering a question of this kind is whether the money is likely to have been used in connection with the gaming. If it is likely to have been so used the Magistrate should order forfeiture otherwise not.

Crown Prosecutor (*P. Govinda Menon*) for the Crown.

A. S. Veeraraghavan for Respondents.

K.S.

The Chief Justice and Narikkal Chathan *v.*
Chandrasekhara Aiyar, J. Kesavan Nambudri.
31*st July,* 1941. **S.A. No. 580 of 1938.**

Malabar Tenancy Act (*XVI of* 1930), *S.* 20, *sub-S.* (5)—*Eviction—Grounds—Landlord requiring holding* bona fide *for his own cultivation—Meaning of "requires"—Element of need or necessity not essential.*

When a landlord demanded or asked for or sued for any land on the ground that he wished to cultivate it himself his statement must be made *bona fide*; there need be no element of need or necessity and the word "requires" in sub-S. (5) of S. 20 of the Malabar Tenancy Act does not mean "in actual positive need".

View expressed in S. A. No. 538 of 1939, (1941) 1 M.L.J. (N.R.C.) p. 77, approved and that in S.A. No. 42 of 1939, not followed. 26 C.W.N. 499, distinguished.

P. Govinda Menon for Appellant.

D. H. Nambudripad for Respondent.

K.S.

Burn and Happell, JJ.
16th July, 1941.

Subbayya and others *v.* Official Receiver, Cuddappah.
C.M.A. No. 368 of 1939.

Provincial Insolvency Act (V of 1920), *S.* 50—*Expunging debts from the schedule of creditors—Burden and standard of proof.*

The Official Receiver moved for expunging certain debts from the schedule of creditors framed by him and relied on certain suspicious circumstances, as disclosed in the evidence of those creditors.

Held, (1) that the burden was on the receiver who wanted to have the names expunged and not on the creditors; (2) that the creditors could only adduce evidence regarding the due execution of the promissory notes and the passing of consideration thereunder and if inspite of that the suspicion remained they could not be expected to do more. The Court's decision ought to be based on the positive evidence in the case and not on suspicious circumstances.

Kasturi Seshagiri Rao for Appellants.

Respondent, unrepresented.

K.S.

Horwill, J.
22nd July, 1941.

The Public Prosecutor *v.* Satyanarayana.
Cr. App. No. 178 of 1941.

Criminal Procedure—Acquittal after consideration of evidence—When to be set aside.

Ordinarily an accused who is acquitted can argue that the Magistrate after giving the evidence his careful consideration had come to the conclusion that the prosecution had not proved beyond all reasonable doubt that he was guilty of the offence with which he was charged. But where the judgment of the Magistrate is clearly unjudicial (no fair and unprejudiced discussion of the evidence being found anywhere in it and there are points in the prosecution case that need careful consideration and cannot lightly be brushed aside), the order of acquittal must be set aside and the appeal remanded for fresh disposal.

The Public Prosecutor (*V. L. Ethiraj*) for Appellant.

P. V. Rajamannar, K. Subba Rao and *N. Seshachalam* for Accused.

K.S.

Wadsworth, J.
23rd July, 1941.

Kondama Naidu *v.* Subba Reddi.
S.A. No. 782 of 1938.

Madras Estates Land Act (Amending Act of 1936), *S.* 6—*Scope—Occupancy rights—When available.*

There is nothing to prevent a whole inamdar in whom both the warams are vested from creating an occupancy right in favour of one of his tenants either by sale or by grant. There can thus be an occupancy right in favour of a cultivating tenant in an *inam* village which is not an estate under the Madras Estates Land Act. Hence a person claiming occupancy rights need not prove that the village was an estate under the Estates Land Act prior to its amendment or that he was in possession so as to claim occupancy rights under the amended Act.

A. Lakshmayya for Appellant.

A. C. Sampath Aiyangar, T. K. Subramania Pillai and *S. Krishnamachariar* for Respondent.

K.S.

N R C

Abdur Rahman, J. Thangavelu Aiyar *v.* Ramabhadra Goundan.
24th July, 1941. **S.A. No. 957 of 1938.**

Transfer of Property Act (IV of 1882), *Ss.* 54 *and* 55 (4)—*Assignment of mortgage debt—If 'sale'—Vendor's lien—Availability.*

The assignment of a mortgage debt falls within the definition of 'sale' and thus attracts the provisions of S. 55 (4) in regard to vendor's lien.

41 M.L.J. 267 and 41 M.L.J. 297, relied on. (1939) 1 M.L.J. 544 (P.C.), referred to.

R. Rangachari for Appellant.

V. T. Rangaswami Aiyangar for Respondent.

K.S.

Burn, J. Venkiah Chetti *v.* Municipal Council, Karur.
24th July, 1941. **S.A. No. 773 of 1938.**

Madras District Municipalities Act (V of 1920), *S.* 78 (3), *Proviso* 1—*Period of 'not less than one month' for submission of objections to proposed levy or increase of tax—Computation—Whether to be from date of publication in the Gazette.*

The period provided in S. 78 (3) proviso of 'not less than one month' for the submission of objections need not be computed from the date of publication of notice in the District Gazette under that section of levy or increase of tax.

A Bhujanga Rao and *D. R. Krishna Rao* for Appellant.

T. K. Sundararaman for Respondent.

K.S.

Horwill, J. Narayanaswami *v.* Narayya.
30th July, 1941. **Crl.R.C. No. 346 of 1941.**
(Crl.R.P. No. 329 of 1941).

Criminal Procedure Code (V of 1898), *S.* 247—*Order by Bench Court improperly constituted—Power to review or rectify lies in High Court and Bench Court itself has no power.*

Three Bench Magistrates sat to consider a case. At a later hearing of the case a fourth Magistrate joined. At the final hearing one of the first three was not present. Of the remaining three only two Magistrates had sat throughout. The case was dismissed under S. 247, Criminal Procedure Code, as the complainant was absent on the date of the final disposal. Later the Magistrates realised that they had passed an illegal order and so proceeded to rectify it by hearing the case once again. On revision,

Held, a Bench Court has no power to correct errors in its judgments or to review its own illegal orders. Such power vests only in the High Court. The illegal order acquitting the accused stands until set aside. As the complainant was absent at the final hearing the result of the case would not have been different even if the Bench Court had been properly constituted. The interests of justice did not require that the accused should stand their trial afresh.

G. Balaparameswari Rao for Petitioner.

T. Venkatadri for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

King, J. Amirthalinga Desikar
30th July, 1941. *v.* Thangammal.
S.A. No. 867 of 1938.

Husband and wife—Decree for separate maintenance in favour of wife—Effect on husband's right to sue for restitution of conjugal rights.

Where in a prior suit the Court had granted separate maintenance to the wife the husband is for ever afterwards debarred from suing for restitution of conjugal rights.

V. T. Rangaswami Aiyangar for Appellant.

M. S. Venkatarama Aiyar for Respondent.

K.S.

Lakshmana Rao, J.
31st July, 1941.

Basamma *v.* Nagi Reddi.
C.R.P. No. 1749 of 1938.

Civil Procedure Code (*V of* 1908), *O.* 33, *r.* 1—*Scope.*

In an application for leave to sue in *forma pauperis* for recovery of certain immovable property the defendants contended that the plaintiff was in possession of the properties for the recovery of which she filed the suit and therefore was not entitled to sue in *forma pauperis.*

Held, that the subject-matter of the suit should be excluded from consideration and the plaintiff must be allowed to sue as pauper.

Kasturi Seshagiri Rao for Petitioner.

K. Srinivasa Rao for Respondent.

K.S.

Horwill, J.
31st July, 1941.

Inayathulla *alias* Rahmathulla—Accused.
Crl. Appeal No. 321 of 1941.

Criminal Procedure Code (*V of* 1898), *S.* 109—*Binding over a person for good behaviour—When to be ordered.*

Where an accused follows no honest employment, lives in the company of notorious criminals and has no ostensible means of livelihood, a Magistrate is warranted in binding over the accused under S. 109, Criminal Procedure Code and calling on the accused to execute a bond for Rs. 100 with two sureties for a like amount to be of good behaviour for a period of one year. Where such accused is unable to furnish the security he can be committed to jail.

Accused not represented.

Crown Prosecutor (*P. Govinda Menon*) for the Crown.

K.S.

Horwill, J.
1st *August,* 1941.

The Inspecting Assistant Commissioner of Income-tax *v.* Javerbhai and others.
Crl.R.C. No. 806 of 1940.
(Crl.R.P. No. 760 of 1940).

Income-tax Act (*XI of* 1922), *S.* 52—*Agent if can present a return—Liability of such agent for making a false return.*

There is no reason why an agent cannot present a return for the assessee his principal. The word 'person' in S. 52 can be given its dictionary meaning and can include the assessee's agent making a return. Accordingly an agent making a fraudulent return on behalf of his principal is liable to be proceeded against for an offence under S. 52 of the Income-tax Act.

V. L. Ethiraj for *A. S. Sivakaminathan* for Petitioner.

K. S. Jayarama Ayyar, V. V. Srinivasa Aiyangar, T. R. Venkatarama Sastri, P. S. Sarangapani, N. D. Varadachari and *R. Viswanathan* for Respondents.

Crown Prosecutor (*P. Govinda Menon*) for the Crown.

K.S.

Somayya, J. Lakshmi Reddi *v.* Lakshmayya.
4th August, 1941. **S.A. Nos. 1055 to 1059 of 1938.**

Evidence Act (I of 1872), S. 21—Admission by party in his deposition in previous criminal proceedings—Effect.

The lower appellate Court decided that an adoption set up by the plaintiff was not proved as there was no proof of giving and taking and explained away the admission by the defendant as to the adoption in a deposition given in earlier criminal proceedings.

Held, on second appeal, (1) that what a party himself admits to be true may reasonably be presumed to be true until the presumption is rebutted; (2) that such an admission can only be explained away by the party who made it and not by the Court; and (3) that no further proof of adoption was necessary in view of the admission contained in the earlier deposition of the defendant in the criminal proceedings. I.L.R. 29 All. 184 (P.C.), relied on.

Kasturi Seshagiri Rao for Appellant.

B. Jagannatha Das for Respondent.

K.S.

Chandrasekhara Aiyar, J. Gundu Rao *v.* Subbiah Chetty.
8th August, 1941. **S.A. No. 139 of 1939.**

Civil Procedure Code (V of 1908), S. 100—Evidence that suit mortgage was supported by consideration—Finding on probabilities of the case that mortgage was not supported by consideration—Not open to attack in second appeal.

Even where the evidence in the case is all one way that the suit mortgage was supported by consideration it is permissible for the lower appellate Court to arrive at a finding on the probabilities of the case that the document was not supported by consideration. Such a finding of fact cannot be attacked in second appeal.

Where the document is found to be nominal and sham even though the executants admit the passing of consideration no decree for money can be passed against the executants.

V. S. Narasimhachari for Appellant.

Kasturi Seshagiri Rao for Respondent.

K.S.

Patanjali Sastri, J. Sepulchre Bros. *v.* Mehta.
8th August, 1941. **C.R.P. No. 2271 of 1939.**

Civil Procedure Code (V of 1908), S. 20, Cl. (c)—Place where letter of acceptance of offer is received—Whether part of the cause of action arose there.

The place where the letter of acceptance is received is also a place where part of the cause of action has arisen.

46 M.L.J. 371 and (1940) Mad. 195 (198), distinguished.

N. Rajagopala Aiyangar for Petitioner.

Kasturi Seshagiri Rao for Respondent.

K.S.

Burn and Happell, JJ. Saradambal *v.* Ramiah Reddi,
22nd July, 1941. **A.A.O. No. 256 of 1940.**

Guardians and Wards Act (VIII of 1890), *S.* 25—*Guardian asking for return of wards to his custody—Necessity of proof that such return will be for welfare of wards.*

Where a father applied under S. 25 of the Guardians and Wards Act for the return to his custody of his minor children from their mother who was living away from him, the overriding consideration will be the welfare of the wards. The guardian whose ward has left him or has been removed from his custody has to discharge the burden of showing that it will be for the welfare of the ward to return to the custody of such guardian.

T. C. K. Kurup and *D. A. Shanmugasundaraswami* for Appellant.

S. S. Ramachandra Aiyar for Respondent.

K.S.

Burn and Happell, JJ. Fatima Bibi *v.* Pevtu Saheb.
23rd July, 1941. **A.A.O. No. 348 of 1939.**

Guardians and Wards Act (VIII of 1890), *Ss.* 19 *and* 25—*Scope—Mahomedan minor girl—Custody—Father and maternal grandmother—Rights.*

On an application under the Guardians and Wards Act by a Mahomedan maternal grandmother for custody of her deceased daughter's minor daughters,

Held, that where the father is not shown to be unfit to be guardian S. 19 will be a bar to such application. Though under Mahomedan law failing the mother, the custody of a Mahomedan girl who has not attained puberty belongs by right to the mother's mother in preference to the father, yet the father of a Mahomedan girl is her legal guardian. Unless the minors had ever been in the custody of the grandmother and had left or been removed from such custody S. 25 can have no application and no question as to whether it will be for the welfare of the minors to be under the custody of the grandmother can arise.

V. Suryanarayana for Appellant.

V. Rangachari for Respondent.

K.S.

Abdur Rahman, J. Ayyavu Thevar *v.* Secretary of State.
23rd July, 1941. **S.A. No. 655 of 1938.**

Evidence—Otherwise inadmissible evidence admitted by consent of parties—When good evidence.

Unless a party can be found to have been estopped from objecting to the admissibility of certain evidence, evidence otherwise not admissible or which would have been liable to rejection if objection were taken to it, cannot be good evidence merely because it is admitted by consent of parties.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

The Government Pleader (K. Kuttikrishna Menon) for Respondent.

K.S.

Wadsworth, J. Kundanmall Sowcar *v.* Muni Ammal.
25th July, 1941. **S.A. No. 741 of 1938.**

Lease—Covenant for option of renewal—Failure to exercise within time fixed—Effect.

When a lease contains a covenant for renewal stipulating that notice of intention to renew should be given before the expiry of the lease the right of renewal is lost if the option is not exercised within the time specified, though the Court may in special circumstances relieve against the loss of the right. The lessee however is not entitled to set up the right to renewal as a defence to a suit for possession on the termination of the lease when the right to exercise the option for renewal is lost.

C. V. Nilakantan for Appellant.

T. E. Ramabhadrachariar for Respondent.

K.S.

King, J.
30th July, 1941.

Potanna *v.* Venkataramana Rao.
S.A. No. 858 of 1938.

Madras Hindu Religious Endowments Act, (II of 1927), *S.* 44-A *Sub-section* 6—*Scope.*

Where pending a suit by a reversioner to the estate of the last male-holder for possession of certain service inam lands, the Government enfranchised the inam lands and issued patta to the defendant,

Held, that the suit whether as regards the right to enjoy the land or the right to the land revenue can still be brought, in spite of the grant of patta by the Government. The Civil Courts have power to decide who is rightfully entitled to the ownership of the land which for other purposes the Government has enfranchised to a party.

T. Satyanarayana for Appellant.

G. Chandrasekhara Sastri for Respondent.

K.S,

Burn and Happell, JJ.
30th July, 1941.

Muthukaruppan Chettiar *v.* Official Receiver, West Tanjore & another.
A. A. O. No. 541 of 1939.

Provincial Insolvency Act (V of 1920), *Ss.* 4 *and* 53—*Scope.*

Although S. 53 of the Provincial Insolvency Act deals only with transfers from an insolvent and not with transfers from the insolvents' transferee, under S. 4 of the Act the Insolvency Court is empowered to go into the question whether such transferee's transferee has or has not good-title to the items covered by the sale-deed in his favour.

M. S. Venkatarama Aiyar for Appellant.

A. V. Visvanatha Sastri for Respondent.

K.S.

Wadsworth, J.
30th July, 1941.

Subramania Aiyar *v.* India Equitable Assurance Company Ltd.
C. R. P. No. 1324 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 10 (2) (*iii*) *and S.* 8—*Debt due to public company carrying interest at less than* 9 *per cent. in renewal of earlier ones carrying interest at* 12 *per cent.—If explanation to S.* 8 *can apply and make it a debt which can be scaled down.*

Where a debt is due to a public company and carries interest at not more than 9 per cent. it is clearly excluded from the operation of Ss. 8 and 9 and therefore those sections cannot be called in aid to substitute for this liability an earlier liability which was renewed and which bore a higher rate

of interest and thereby exclude it from the operation of S. 10 (2) (*iii*) of Act IV of 1938.

T. L. Venkatarama Aiyar and *L. Krishnaswami Aiyar* for Petitioner.

S. Srinivasa Aiyar instructed by *King* and *Partridge* for Respondent.

K.S.

The Chief Justice and Chandrasekhara Aiyar, J.
31st July, 1941.

Suryanarayana *v.* Debt Conciliation Board, Peddapuram.
C.M.P. No. 1882 of 1941.

Madras Debt Conciliation Act (XI of 1936), S. 18 (1)—Power of Board to certify that reasonable offer by debtor has been refused.

Where a Debt Conciliation Board has not attempted to scale down a creditor's debt under Madras Act IV of 1938 but has only issued a certificate under S. 18 (1) of the Debt Conciliation Act saying that the offer which the debtor made to the petitioner was a reasonable one as based on the amount which will be due if the debt was scaled down, the Court cannot go into the question whether it was really reasonable or not; that is a matter for the Board only and the orders of the Board cannot be quashed by the issue of a *writ of certiorari.*

K. Umamaheswaram for Petitioner.

K. Rangachari for second Respondent.

K.S.

Somayya, J.
1st August, 1941.

Samuel Nadar *v.* Thangayya Nadar.
S. A. No. 1084 of 1938.

Partnership Act (IX of 1932), S. 42—Partnership for conducting 50 months chit transaction—Stopping of auction with 42nd month—Dissolution of partnership—When takes place—Suit for dissolution—Limitation.

Appellant and respondent were partners who conducted a chit transaction. Auction ceased after the 42nd call (the chit being for 50 months). More than 3 years after the last chit a suit was filed for dissolution and for accounts by the respondent. The lower appellate Court held that the suit was barred.

Held, applying S. 42 of the Indian Partnership Act, that the suit was in time under Art. 106 of the Limitation Act. The partnership was not dissolved when the auction ceased and time did not begin to run till after the completion of the business for which the partnership was started.

(1938) 1 M.L.J. 574 followed.

25 C.W.N. 847: (1930) Lah. 378: 53 M.L.J. 245 (P.C.), referred to.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

R. Rangachari for *Mr. K. Rajah Aiyar* for Respondent.

K.S.

Wadsworth, J.
1st August, 1941.

Parukutty Amma *v.* Ramakrishna Aiyar.
C.R.P. No. 1544 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 15 (4)—Payment into Court before 30—9—1938—Notice to landlord only later—Effect.

Under S. 15 (4) of Act IV of 1938, what is required is a payment into Court and not a payment to the landholder, before 30th September, 1938. If the payment into Court is made before that date it will not be an invalid deposit merely because notice went to the true landholder only after 30th September, 1938.

N. Gopala Menon and *V. Karunakara Menon* for Petitioner.

K. P. Ramakrishna Aiyar for Respondent.

K.S.

Abdur Rahman, J.
5th August, 1941.

Gangayya *v.* Lakshmi Devi.
S. A. No. 1124 of 1938.

Criminal Procedure Code (*V of* 1898), *Ss.* 88, *Cl.* 6 (d) *and S.* 488—*Money realised by criminal Court by sale of properties attached in execution of maintenance order—Rejection of claim by third party—Subsequent suit—Government if necessary party—Scope of suits under S.* 88, *Cl.* 6 (d),

Respondent obtained an order under S. 488 of the Code of Criminal Procedure for maintenance against her husband. She got some paddy attached in execution. The paddy was sold and the sale proceeds were lying in the Magistrate's Court. The second wife of the husband of the respondent and her own maternal uncle filed separate suits each claiming the whole of the paddy attached, after their claims had been rejected by the Criminal Court. The suits were for the recovery of the money either from the Magistrate's Court or from the respondent in the event of the money having been paid to her.

Held, that as the Government had no claim to the money realised, the suit is competent without impleading the Government. S. 88, Cl. 6 (*d*) of the Criminal Procedure Code entitles a party whose claim or petition has been disallowed in whole or in part, to institute a suit to establish the right, which he claims against the property in dispute. The mere fact that on account of the sale of the property the claimant asks for recovery of money instead of a declaration does not take the suits out of the category of suits contemplated by S. 88 Cl. 6-*D* of the Code of Criminal Procedure.

B. Jagannadha Das for Appellant.

G. Chandrasekhara Sastri for Respondent.

K.S.

Horwill, J.
6th August, 1941.

Perianna Mudali and others,
Accused.
Cr.R.C. No. 493 of 1941
(Cr.R.P. No. 464 of 1941).

Criminal Trial—Jurisdiction—Aggravating facts making offence one triable by a Magistrate with higher powers—Effect on Magistrate's jurisdiction to try only the lesser offence.

Where a Sub-Magistrate really believed that the whole body of facts revealed to him constituted an offence triable by him—(a lesser offence which he had jurisdiction to try)—and had not deliberately overlooked any aggravating facts with a view to securing for himself jurisdiction over the offence, his proceedings would be proper and the High Court will not interfere.

V. T. Rangaswami Aiyangar for Petitioners.

Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Horwill, J.
8th August, 1941.

Jothi Venkataswami, *In re.*
Cr.R.C. No. 508 of 1941
(Case Referred No. 29 of 1941).

Madras Suppression of Immoral Traffic Act (*V of* 1930), (*amended by Act VII of* 1938), *S.* 8-A (2)—*Presumption under.*

Where two girls are said to have been living by prostitution the accused's association with them involves the presumption laid down in S. 8-A (2) of the Suppression of Immoral Traffic Act that he is living on their earnings.

Public Prosecutor (V. L. Ethiraj) for the Crown.

A. Gopalacharlu for accused.

K.S.

Lakshmana Rao, J.
8th August, 1941.

Nandikotkur Mahomedan Religious Endowments Committee *v.* Mulla Nabi Sahib.
C.R.P. No. 1691 of 1939.

Suit valuation—Suit by Muzawars for recovery of possession of wakf property alienated by previous managers—Valuation for purposes of jurisdiction.

Plaintiffs some Muzawars, who were not parties to a sale deed executed by the previous managers of a wakf, sued to set aside the sale deed and to recover possession of the wakf properties comprised in the sale deed. The value of the suit for purposes of jurisdiction was stated to be Rs. 4,500 being the amount for which the sale deed was executed. The trial Court dismissed the suit and an appeal was preferred to the District Court, which held that an appeal lay only to the High Court and not to itself on the ground that the plaintiffs had to seek in such a case two reliefs, namely, (1) for a declaration that the sale deed was not binding and (2) for possession, and that the value for purposes of jurisdiction would be over Rs. 6,960. On revision,

Held, that the plaintiffs were not bound to ask for setting aside the sale deed as they were not parties to it and the only relief, namely, for possession being of the value of Rs. 3,480 an appeal lay to the District Court.

Kasturi Seshagiri Rao for Petitioner.

S. S. Bharadwaj for Respondent.

K.S.

Lakshmana Rao, J.
11th August, 1941.

Govindasamy Pillai *v.* Anjaneya Chetty
C.R.P. No. 1974 of 1940.

Civil Procedure Code (V of 1908), *S.* 51—*Scope—Arrest of judgment-debtor—When proper.*

Where in an application for execution by way of arrest of the judgment-debtor, the lower Court made an order in these terms: "From the counter of the judgment-debtor himself, it is clear that he has got means to pay the E.P. amount. The fact that his property though valuable is encumbered, is not sufficient to hold that he has not got the means to pay the amount. As the decree stands, the petitioner is entitled to recover the amount either by way of arrest or attachment of the judgment-debtor's properties.

I see no good reason to curtail his right of arrest. It is open to the judgment-debtor to sell his property and pay off the amount due. He is not justified in asking the decree-holder to do it. His objection is therefore overruled."

Held, that this order was not in sufficient compliance with law under S. 51, C. P. Code, and that the order should be set aside and the application remanded for a proper disposal.

S. Jagadisa Aiyar and *G. R. Jagadisan* for Petitioner.

T. K. Srinivasathathachariar for Respondent.

K.S.

Burn, J.
13th August, 1941.

Syed Ismail Sahib *alias* Syed Tahsildar Sahib *v.* Ethiksha Sarguru *alias* Syed Chanda Sahib.
C. R. P. No. 1804 of 1939.

Mussalman Wakf Act (XLII of 1923), *Ss.* 3 *and* 10—*Default of* muttawalli *in not filing particulars relating to* wakf *under S.* 3 *of the Act—Proper Court to try the offence.*

An application was made to the District Court under S. 10 of the Mussalman Wakf Act to punish the respondent who was alleged to be the muttawalli for his default in not having filed under S. 3 of the Act the particulars of the *wakf*. The respondent denied the *wakf* character of the properties as well as his position as *muttawalli* and also contended that the District Court had no jurisdiction to enquire into the petition.

Held, that as the proceedings under S. 10 of the Wakf Act related to an offence as defined under S. 4 of the Criminal Procedure Code and as the District Court was not mentioned in S. 10 of the Wakf Act as the Court to try the offence it was only the ordinary criminal Courts that had jurisdiction to punish a person under S. 10.

The question whether the Court had jurisdiction in the proceedings to enquire about the existence of the *wakf* when it was denied was left open.

K. Bhashyam Aiyangar for the Petitioner.

S. Panchapagesa Sastri and *G. Srinivasa Aiyangar* for Respondent.

K.S.

Somayya, J.
14th August, 1941.

Venkatachelamiah *v.* Venkatayya,
S. A. No. 1156 of 1938.

Transfer of Property Act (IV of 1882), *S.* 52—*Scope—Arbitrator appointed by Registrar of Co-operative Societies—If "Court".*

The expression "Court" in S. 52 of the Transfer of Property Act is wide enough to cover the case of an arbitrator exercising judicial functions and determining a dispute. Where during the pendency of legal proceedings regarding a mortgage in favour of a co-operative society before an arbitrator appointed by the Registrar of Co-operative Societies a person takes a mortgage of the properties he cannot enforce the same as against a purchaser under the earlier mortgage in enforcement of the award.

A.C. Sampath Aiyangar and *S. Krishnamachari* for Appellant.
Kasturi Seshagiri Rao for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
14th August, 1941.

The Nagore Durga represented by its Managing Trustees *v.* Chatram Manager, Kannu Pillai.
S.A. No. 1039 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 17—*Extended period of Limitation for recovery of rent—Availability against non-agriculturist tenants.*

The benefit of the extended period of limitation was conferred on a landholder under S. 17 of Act IV of 1938 in respect of all suits for recovery of arrears of rent against a tenant irrespective of the fact whether the tenant was or was not an agriculturist.

K. V. Ramachandra Aiyar for Appellant.

S. Ramachandra Aiyar and *R. Sundaralingam* for Respondent.

K.S.

Abdur Rahman, J. Sudarsana Rao *v.* Appadu and others.
18*th July*, 1941. C.M.P. No. 1486 of 1941 in S.A. No. 287 of 1938.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 8 (1)—"*Interest*" *included in decree for mesne profits—Liability to be scaled down.*

Though interest is an integral part of the definition of mesne profits as given in S. 2 (2) of the Code of Civil Procedure, where there is a decree for mesne profits the Court is not precluded from dealing with the interest separately and holding that it should be deemed to be discharged under S. 8 (1) of Act IV of 1938 and therefore irrecoverable.

B. V. Subramanyam for Petitioner.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondents.

K.S.

Somayya, J. Narasimha Rao *v.* Venkataramana Rao.
31*st July*, 1941. S. A. No. 278 of 1939.

Madras Hereditary Village Offices Act (*III of* 1895), *Ss.* 13 *and* 21—*Scope—Suit in Civil Court for declaration that a person has been appointed in contravention of S.* 10 (2)—*Jurisdiction of Civil Court.*

Where a person claims a right of succession under the Madras Hereditary Village Offices Act and a third party has been appointed by the Revenue authorities in alleged violation of his right, his remedy is to sue under S. 13 of the Act in the Revenue Court for recovery of his office from the person alleged to have been wrongfully appointed. S. 21 of the Act bars the Civil Court from entertaining such a suit. The plaintiff by merely confining his relief as one for a declaration of the invalidity of defendant's appointment cannot be permitted to agitate the matter before a Civil Court. The granting of a mere declaratory relief is discretionary and the Civil Court will refuse to grant it when the remedy which he asks is unnecessary and where the relief which he really wants is to be sought in the Revenue Courts.

K. Kameswara Rao for Appellant.

K. Venkatarama Raju for Respondent.

K.S.

Abdur Rahman, J. Jaffar Sahib *v.* Kathiya Bi.
4*th August*, 1941. S.A. No. 159 of 1939.

Award—Oral award—Acceptance in writing—Want of registration—Effect on enforceability.

K, a widow, instituted a suit against her husband's brother basing her claim on a document executed by him. The document was as follows:—"In accordance with the decision of the *jamatdars* mentioned hereunder which I have accepted, I hereby agree to take the share of the properties of my deceased younger brother, and pay *K*, his wife, the sum of Rs. 525 only as *mahr* within six months from this date . . . . ." It was contended that the money claim cannot be separated from the rest as the document dealt with one indivisible transaction and being unregistered was inadmissible in evidence and therefore unenforceable.

Held, that the oral award did not require registration and the mere acceptance by the defendant in writing would not make it inadmissible or unenforceable.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Appellant.

B. C. Seshachala Aiyar for Respondent.

K.S.

NRC

Horwill, J.
5th August, 1941.

Seshamma, *In re.*
Cr.R.C. No. 306 of 1941
(Cr.R.P. No. 290 of 1941).

Local Board—Licence—"Coffee house"—What constitutes.

It is a question of fact in each case whether the circumstances under which coffee is sold will indicate that the place of sale was a coffee house or not. Where all the paraphernalia of a coffee house with considerable accommodation existed it comes under the definition of a coffee house. The distinction would seem to lie in the formality or informality under which the coffee or tea is sold.

The question, whether a person having a licence to use a house as a meals hotel was entitled to sell coffee therein without a further licence, was left open.

S. Suryaprakasam for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K. S.

Wadsworth, J,
6th August, 1941.

Shahul Hamid *v.* Thenappa Chettiar
S. A. No. 1184 of 1938.

Practice—Suit on promissory-note—Defence of absence of consideration and that note was executed under undue influence—Evidence of similar transactions entered into by defendant—Relevancy.

In a suit on a promissory note the defendant pleaded that there was no consideration and that he executed the suit promissory note under undue influence when he was a young man who under the influence of evil companions had been led into vicious ways and had taken to intoxicants. Evidence as to the extravagant life of the defendant and the way in which under the influence of the evil companions he had been made to execute other documents without proper consideration was let in.

Held, that when the defendant wants to shift the burden on to the plaintiff of proving good consideration for the note, he is entitled to let in evidence that he executed the suit document as a very young man who had got into vicious habits owing to the influence of bad companions and had thereby been led to a course of conduct which made him ready to execute documents for inadequate consideration. The evidence of previous conduct and circumstances was therefore relevant.

T. L. Venkatarama Aiyar and *M. V. Ganapathi* for Appellant.

T. M. Ramaswami Aiyar for Respondent.

K.S.

Venkataramana Rao, J.
6th August, 1941.

Sundararajulu *v.* Shanmugham and others.
S.A. No. 642 of 1938.

Hindu Law—Ancestral business—Tests.

If a business is to be considered not to be new it must be shown to be a continuation or revival of an old family business. Where a business was started by a manager which had absolutely no connection with the old business, the fact that the business started was of the same nature as the old business cannot make it an ancestral business.

R. Sundaralingam and *S. Seshadri* for Appellant.

K. S. Desikan for Respondents.

K.S.

Horwill, J.
8th August, 1941.

Palayan Accused.
Crl. R.C. No. 675 of 1941
(Crl. R.P. No. 635 of 1941)

Criminal Procedure Code (V of 1898), *S.* 350—*Scope.*

There is nothing in S. 350, Criminal Procedure Code which prohibits a Magistrate from exercising his discretion of examining all the witnesses again, merely because the accused who has recalled them has exercised his right under proviso (*a*) to S. 350. Though the accused who has recalled witnesses has a right to say that no more witnesses should be examined the Magistrate has the privilege under S. 350 (1) of the Code to examine all.

Lobo for *Pais, Alvares* and *Lobo* for Petitioner.

K. V. Ramaseshan for *Crown Prosecutor* for the Crown.

K. S.

Venkataramana Rao, J.
8th August, 1941.

Petha Gounder *v.* Sami Gounder.
S. A. No. 845 of 1938.

Evidence Act (I of 1872), *S.* 73—*Disputed signature—Duty of Court to compare with admitted signature.*

In a suit on a promissory note, the genuineness of the endorsement relied on to save limitation, was disputed. Though a number of documents containing admitted signatures were filed for purposes of comparison, the lower appellate Court decreed the suit holding the endorsement to be genuine, on the evidence in the case, but after declining to compare the disputed signature with the undisputed signatures in the other documents.

Held, that the proper procedure was to act under S. 73 of the Indian Evidence Act and the Court cannot decline to compare the signatures.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

S. Panchapagesa Sastri and *G. Natarajan* for Respondent.

K. S.

Abdur Rahman, J.
13th August, 1941.

Kayambu Pillai *v.* Court of Wards and others
C. M. P. No. 4426 of 1940.

Limitation Act (IX of 1872), *S.* 5—*Application for excusing delay—What is "sufficient cause"—Analogy of S.* 14.

In applying S. 5 to cases where delay has been caused by prosecuting in good faith and with due diligence other proceeding or proceedings for substantially the same reliefs in another Court which was for defect of jurisdiction or for other causes of a like nature unable to entertain the same the analogy of S. 14 is an argument of considerable weight though S. 14 as such has no application to the case.

Though the excusing of the delay will affect the valuable right that has accrued to the respondent the question has to be approached from the point of view of the petitioner's conduct rather than with reference to the advantage gained by the respondent.

S. Sundaresa Aiyar for Petitioner.

K. Kuttikrishna Menon for Respondent.

K.S.

Horwill, J. Public Prosecutor, Madras *v.* Lury & Co.
14th August, 1941. **Crl.App. No. 149 of 1941.**

Companies Act (*VII of* 1913), *S.* 32 (5)—*Default without wilful neglect—If punishable.*

Under S. 32 (5) of the Companies Act, mere default, in not filing before the Registrar of Joint Stock Companies a list of members of the company on the date of the first annual general body meeting, is punishable even if there is no "wilful neglect" on the part of the directors. Where the company and not its representatives in their personal capacity that is sought to be convicted "wilful default" need not be proved.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

D. Narasaraju for Respondents.

K.S.

Horwill, J. Karuppannan—Accused.
18th August, 1941. **Crl. R. C. No. 477 of 1941**
(Case Referred No. 25 of 1941).

Penal Code (*XLV of* 1860), *S.* 67—*Imprisonment in default of payment of fine—Limits.*

The accused was convicted under S. 6 of the Fisheries Act and sentenced to pay a fine of Rs. 30. The fine was not paid and so the Magistrate sentenced him to three months' simple imprisonment in default. The District Magistrate being of opinion that it was not within the power of the Sub-Magistrate to sentence the accused to such a severe term referred the matter to the High Court and the explanation of the Sub-Magistrate was called for. The Sub-Magistrate's opinion was that the scale mentioned in S. 67 of the Penal Code had no reference to the actual fine imposed but to fines that were permissible under the section under which the accused was convicted.

Held, that S. 67 refers to fines actually imposed and not to fines which the Court might have imposed. The sentence was reduced accordingly to six weeks' simple imprisonment.

Accused not represented.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Abdur Rahman, J. Srinivasa Aiyar *v.* Subramania Aiyar.
19th August, 1941. **S.A. No. 182 of 1939.**

Transfer of Property Act (*IV of* 1882), *S.* 60—*Amount remaining due—Construction.*

A father and son executed a mortgage in 1927 stipulating for the repayment of the money with interest at 12 per cent. per annum within two years, interest being payable every year. In default the mortgage bond provided that the mortgagors should pay interest at an enhanced rate of 18 per cent. on the arrears of interest then due and on the principal.

Subsequently in 1937, the mortgagors effected a partition agreeing therein to pay the mortgage debt in equal moieties. The son then died and his widow sold her half share to another person who paid off the half share of the debt with interest calculated at the enhanced rate provided in the bond.

In a subsequent suit by the mortgagee against the vendee of the other co-mortgagor's share, it was contended *inter alia* that the enhanced rate of interest was not enforceable and that credit must be given to him for the excess paid and endorsed on the bond calculated at the penal rate and that the mortgage debt was indivisible, and that the only amount due was the amount "remaining due" under S. 60 of the Transfer of Property Act.

Held, that the amount paid by the co-mortgagor on the footing of the enhanced interest was in the nature of a voluntary payment and cannot be taken into account in the suit against the other mortgagor's representative in interest. I.L.R. 15 Bom. 257 and I.L.R. 28 Mad. 555, referred to and relied upon.

M. S. Venkatarama Aiyar for Appellant.

S. Jagadisa Aiyar for Respondent.

K. S.

Venkataramana Rao, J. Athiappa Chettiar *v.* Ibramsa Rowther.
21st August, 1941. S.A. No. 257 of 1939.

Provincial Insolvency Act (V of 1920), Ss. 28 (6), 34, 44 and 47—Mortgagee's right to personal decree under O. 34, r. 6 of Civil Procedure Code (V of 1908)—Whether lost by order of absolute discharge in mortgagor's insolvency.

The mortgagor's liability to a personal decree in respect of a mortgage debt is a debt provable in his insolvency and the mortgagee is not entitled to apply under O. 34, r. 6 of the Civil Procedure Code for a personal decree against the mortgagor for any deficiency after an order of absolute discharge has been made in the mortgagor's insolvency.

I.L.R. (1940) Nag. 512 and A.I.R. 1938 Lah. 217, followed.

I.L.R. 54 All. 428 and I.L.R. (1939) All. 492, dissented from.

T. L. Venkatarama Aiyar and *M. V. Ganapathi* for Appellant.

R. Ramasubbu Aiyar for Respondent.

[*N.B.*—This question arising on similar facts in S. A. No. 1119 of 1938 has recently been referred by King, J., to a Bench.]

K.S.

The Chief Justice and Chandrasekhara Aiyar, J. Subbaroya Chettiar *v.* Debt Conciliation Board, Cuddalore and others.
21st August, 1941. C. M. P. No. 1548 of 1941.

Madras Debt Conciliation Act (XI of 1936), Ss. 7, 8 and 17—Board proceeding under S. 8—Conciliation not possible within twelve months—Debtor moving Board to dismiss application under S. 7 to enable him to file fresh application—Proper procedure—Lacuna in the Act pointed out.

When once a Debt Conciliation Board took an application on file and found no formal defects which would enable the Board to dismiss the petition under S. 7 and the Board proceeded to pass orders under S. 8 of the Act, it had thereafter no jurisdiction to go back and dismiss the petition under S. 7 and thereby evade the statutory duty of rejecting the application under S. 17 at the expiry of twelve months which would have precluded a fresh application.

The omission to give the Board power to extend its proceedings beyond twelve months is a defect in the Act which the Courts could not remedy and the remedy lay with the Legislature.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Petitioner.

S. Panchapagesa Sastri and *T. E. Ramabhadrachariar* for Respondents.

The Government Pleader (K. Kuttikrishna Menon) for the Debt Conciliation Board.

K.S.

[F.B.]

The Chief Justice, Krishnaswami Aiyangar and Chandrasekhara Aiyar, JJ.

25th August, 1941.

Hamidgani Ammal *v.* Ammasahibammal

S. A. No. 305 of 1938.

Civil Procedure Code (V of 1908), S. 47—Scope—Legal representative added in execution proceedings—If bound to set up his independent title—Subsequent suit asserting such right, if barred by S. 47, C. P. Code.

On a question whether the legal representative of a deceased person against whom a decree for specific performance by way of execution of a deed of sale of specific properties had been passed is bound to set up his independent title to the properties, when added as a party to that suit after the decree, in execution proceedings and whether on his failure to do so S. 47, Civil Procedure Code, operated as a bar to a separate suit on that title,

Held, that a separate suit is not barred as any claim on his independent title would constitute an attack on the decree itself which could not be allowed in execution proceedings.

I.L.R. 7 Mad. 255, 71 M.L.J. 511 and 71 M.L.J. 725, disapproved.

I.L.R. 30 Mad. 26, I.L.R, 32 Mad. 439 and I.L.R. (1940) Mad. 123, followed.

K. V. Ramachandra Aiyar for Appellant.

P. V. Rajamannar and *R. Sundaralingam* for Respondent.

K.S.

(F.B.)

The Chief Justice, Krishnaswami Aiyangar and Chandrasekhara Aiyar, JJ.

25th August, 1941.

Kutti Ammal *v.* Anganna Mudaliar and others.

S. A. No. 74 of 1941.

Civil Procedure Code (V of 1908), S. 2 (2)—"Decree"—Order rejecting appeal for non-payment of court-fee after dismissal of application for leave to appeal as pauper—If "decree"—If second appeal lies.

An order rejecting an appeal for non-payment of court-fee, after an application for leave to appeal as a pauper had been dismissed and the court-fee was not paid within the time given, is not a decree and no second appeal lies therefrom to the High Court. Decision of the Full Bench in S. R. No. 27375 of 1939, [(1940) 2 M.L.J. (N.R.C.) p. 12], followed.

T. R. Srinivasa Aiyar for Appellant.

D. Ramaswami Aiyangar and *T. P. Kannabhiran* for Respondent.

K. S.

Burn, J. Krishna Aiyar *v.* Krishna Ganapatigal.
12th August, 1941. **C. R. P. No. 1761 of 1939.**

Practice—Appeal—Pendency of application for review—If a reason for excusing delay in filing the appeal.

The presentation of an application for review is no bar to the filing of an appeal, and therefore the mere fact that an application for review was pending, did not prevent a person from appealing, and could not be a reason for excusing the delay in filing the appeal.

S. V. Rama Aiyangar for Petitioner.

R. S. Srinivasacharya and *K. V. Rajagopalan* for Respondent.

K.S.

Venkataramana Rao, J. Kuppuswami Pillai *v.* Sebastian.
13th August, 1941. **S.A. No. 952 of 1939.**

Madras Estates Land Act (I of 1908)*—Whole inam village—Tenant relinquishing possession on* 1-7-1935*—If loses occupancy rights conferred by Amending Act of* 1936.

A lessee of lands forming part of a whole inam village after giving up possession before 1st July, 1935 subsequently claimed occupancy rights conferred by the Amending Act of 1936.

Held: Once the land has been vacated by the tenant and the landlord or a subsequent lessee from him enters the land it must be deemed that there has been a relinquishment of possession by the former tenant so as to entitle the landlord to put a new tenant in. The fact that the tenant vacated the land in ignorance of his occupancy rights is immaterial, so long as the relinquishment was not influenced by anything done by the landlord. Accordingly a tenant who on the termination of the lease had voluntarily given up possession of the land on the 1st July, 1935 cannot claim any occupancy right by virtue of the Act of 1936 amending the Madras Estates Land Act.

B. Sitarama Rao, T. S. Narasinga Rao and *A. R. Krishnaswami* for Appellant.

The Advocate General (Sir A. Krishnaswami Aiyar), K. Subramania Aiyar and *K. S. Desikan* for Respondent.

K. S.

Abdur Rahman, J. Alagianayakathammal *v.* Abul Rahman Marakayar.
14th August, 1941. **S. A. Nos. 906 to 934 and 999 of 1939.**

Madras Estates Land Act (I of 1908)*, S.* 75*—Collector's decision for payment of rent in kind—Whether decree or order—Appeal only to District Judge—Absence of specific provision for further appeal to High Court—C. P. Code, S.* 100*—If applicable.*

A decision by the Collector under S. 75 of the Estates Land Act for payment of rent in kind is not a decree and there can be only one appeal *i.e.*, to the District Court. There is no provision in the Act which permits a further appeal to the High Court. As the decision of the Collector is in the nature of an order the appeal against such order must be regarded to be a continuation of the proceedings before the Collector and the decision by the District Court on appeal cannot be characterised as a decree. The provisions of S. 100, Civil Procedure Code cannot apply and no appeal is competent against the decision of the District Court.

U. Somasundaram for Appellants.

T. K. Subramania Pillai and *M. G. Shanmugham* for Respondents.

K.S.

N R C

Burn, J. Chenchuramiah *v.* Ramiah.
14th August, 1941. **C. R. P. No. 1851 of 1939.**

Limitation Act (IX of 1908), S. 20—Part payment without mentioning whether it is for principal or interest—Effect.

Lakshmi Naidu v. *Gunnamma*, I.L.R. 58 Mad. 418, has not been overruled by the decision of the Judicial Committee in *Ramshah* v. *Lal Chand*, I.L.R. 21 Lah. 470.

P. Srikantam for Petitioner.

G. Jagadisa Aiyar for Respondent.

K.S.

Chandrasekhara Aiyar, J. Lakshminarayana *v.* Suryanarayana.
15th August, 1941. **C. R. P. No. 1418 of 1939.**

Practice—Decree in suits for partition—Power of Judge to pass appropriate orders as to shares etc., till decree is engrossed on stamp paper and signed by the Judge.

So long as the decree was not engrossed on stamp paper and signed by the Judge as it should be done in suits for partition, the suit can be said to be really pending with the consequence that the Judge has got power to pass appropriate orders as regards the shares, or the allocation of properties or payment of compensation to equalise value or the adjustment of any equities.

B. Jagannadha Das for Petitioner.

B. V. Ramanarasu for Respondent.

K.S.

Abdur Rahman J. Appalaswami *v.* Municipal Council, Vizianagaram.
18th August, 1941. **S. A. No. 91 of 1939.**

Contract Act (IX of 1872), S. 65—Third party receiving advantage under a contract discovered to be void—Liability to return or make compensation.

The Municipal Council of Vizianagaram passed a resolution on 28-10-1925 agreeing to give a plot of land on lease for 5 years at Rs. 10 per month to defendants 1 and 2 who wished to erect a theatre. Possession of the land was delivered in November, 1925, and the hall was constructed by May, 1926. The lease was to terminate in November, 1930, but the lease deed was not registered till 13th December, 1927, and even then it did not comply with the statutory requirements and therefore was declared by the Court to be void. The 3rd defendant who had in the meanwhile advanced money for the construction of the hall was let into possession of it, which he was to have for 22 months. He was also to make a further advance. The third defendant took the hall with the object of exhibiting pictures. The original lease had provided that if the lessees were to let the hall to others for staging dramas or exhibiting films they should pay the lessor a rent of Rs. 5 for every play and Rs. 2 for every cinema performance. The Municipal Council sued defendants 1, 2 and 3, for recovery of rent or in the alternative for damages for use and occupation or for compensation under S. 65 of the Contract Act. Without deciding whether the transaction with the third defendant was a mortgage or a lease,

Held, the lease having been found to be void there is no assignment of the lease to the 3rd defendant. Though a claim for damages for use and occupation can only be made against parties like defendants 1 and 2 who held possession permissively and not against a party like the 3rd defendant to whom possession was subsequently transferred by the persons in such permissive possession, if such third party is found to have received an

advantage through a contract which is discovered to be void or which has subsequently become void he would be bound to restore it or to make compensation for it to the person from whom he received it. The third defendant having had the use of the site belonging to the Municipal Council is under a liability to the council under S. 65 of the Contract Act.

I.L.R. 9 All. 340, applied.

P. Somasundaram for Appellant.

V. Govindarajachari for Respondent.

K.S.

Horwill, J.
18th August, 1941.

Raju Chettiar *v.* Doraikannu Ammal.
Crl. R. C. No. 350 of 1941
(Crl. R. P. No. 332 of 1941).

Criminal Procedure Code (V of 1898), *S.* 386 (b)—*Sentence of fine and in default imprisonment—Direction that fine if recovered should be given to complainant as compensation—Default in payment of fine and consequent serving of term of imprisonment—Subsequent order for realisation of fine by sale of movables—If proper.*

Though the normal course is not to order recovery of fine after the full term of imprisonment in default of payment has been served, where there is a direction for the payment of the fine if recovered to be paid as compensation to the complainant, an order for realisation of the fine by the sale of the articles taken from the accused at the time of his arrest is not improper.

B. T. Sundararajan for Petitioner.

C. D. Venkataraman for *The Crown Prosecutor.*

A. S. Sivakaminathan for Respondent.

K.S.

Somayya, J.
19th August, 1941.

Chema Reddi—Petitioner.
C. M. P. Nos 3269 and 3901 of 1941.

Civil Procedure Code (V of 1908), *O.* 47, *r.* 1—*First appeal heard by two judges—Review application—Only one of the judges available—If can be heard by him alone or if it should be by a Bench of two Judges.*

Where after the disposal of an appeal by a Bench of two Judges an application for review is made when only one of the Judges who heard the appeal remained attached to the Court, the application can be heard by the remaining Judge alone. I.L.R. 16 Cal. 788 and 9 I.C. 532, relied on. It is the invariable practice of the Madras High Court that even in first appeals the application for review is heard and decided only by the Judges who heard the appeal or where one of them is absent, by the other Judge sitting alone.

V. Kachapeswara Aiyar, P. V. Rajamannar and *K. Subba Rao* for Petitioners.

K. S.

The Chief Justice and
Chandrasekhara Aiyar, J.
20th August, 1941.

Desai *v.* Bala Bhai & Sons.
O. S. A. No. 11 of 1941.

Presidency Towns Insolvency Act (III of 1909), *Ss.* 9 *and* 13—*Notice of suspension of payment alleged as act of insolvency—If to be set out in petition itself or may be in affidavit in support of it.*

Where the petition states that the debtor has given notice to his creditors that he has suspended or that he is about to suspend payment of his debts

and the affidavit verifying the petition shows that this is in fact the case there is compliance with the law's requirements. The petition and the affidavit should be read together and if the petitioning creditor sets out in sufficient detail the facts on which he is relying, the debtor can have no complaint whether the information is contained in the petition or in the affidavit.

I.L.R. 13 Rang. 686, not followed.

B. K. B. Naidu and *S. Athmanathan* for Appellant.

T. V. Srinivasan for Respondents.

K. S.

Horwill, J.
21st August, 1941.

Moongan and others *v.* Roshan Ali Sahib.
Cr. R. C. No. 316 of 1941
(Cr. R. P. No. 300 of 1941).

Criminal trial—Misjoinder of accused—Conviction if to be set aside—Presumption as to prejudice to accused.

Where there was no intention or object common to two sets of persons cutting trees in different parts of a forest, trying them together will amount to misjoinder of parties. Where the accused have been so tried jointly prejudice should be presumed, unless it is quite certain that there could have been none. Where the impugned procedure works actual injustice to the accused the convictions should be set aside and separate trials ordered. (Authorities discussed.)

K. S. Jayarama Aiyar for *G. Gopalaswami* and *V. V. Radha Krishnan* for Petitioners.

V. T. Rangaswami Aiyangar for *K. S. Sundaram* and *M. R. Ramachandra Pant* for Respondent.

Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Chandrasekhara Aiyar, J.
22nd August, 1941.

Timmi Reddi *v.* Krishna Pillai.
C. R. P. No. 10 of 1941.

Madras Hereditary Village Offices (*Act III of* 1895), *Ss.* 13 *and* 21—*Suit for arrears of emoluments—Civil Court's jurisdiction.*

Where plaintiff a karnam of a village in a proprietary estate sued in the District Munsiff's Court for arrears of karnam meras which constituted the emoluments attached to the office,

Held, that the jurisdiction of the Civil Court to try such a suit was not barred as the plaintiff did not allege in his plaint that he was entitled to hold that office on the date of his plaint and as there was no relief claimed for a declaration to that effect when alone the Civil Court's jurisdiction would be ousted.

Kasturi Seshagiri Rao for Petitioner.

V. N. Sarma for *Ch. Raghava Rao* for Respondent.

K. S.

Lakshmana Rao, J.
25th August, 1941.

D.N.C. & Co., *v.* Hazi Fazal Hussain.
C. R. P. No. 2124 of 1940.

Civil Procedure Code (*V of* 1908), *S.* 10—*Same parties—Suit against a partner of a firm in respect of a debt due by the firm—Prior suit by legal representatives of a deceased partner for rendition of accounts—Whether*

between the same parties or between parties under whom they or any of them claim.

The petitioner filed a suit in the City Civil Court Madras, against the respondent who was the surviving partner of a firm, on the basis of a settlement of account, in respect of dealings which the firm had with the petitioner. In a previously instituted suit for accounts in the City Munsif's Court, Cawnpore, by the legal representatives of a deceased partner of the firm, the present petitioner who was admittedly a third party to the partnership was impleaded as a defendant along with the surviving partner on the ground that he was liable to render accounts of all the dealings which the firm had with the petitioner in his capacity as agent of the firm. The plaintiff and the defendant in the Madras suit were arrayed as defendants in the Cawnpore suit, the one issue common to both the suits being whether the settlement of accounts set up by the petitioner was true and binding. An application under S. 10, C. P. Code, was filed by the respondent in the City Civil Court to stay the suit pending the disposal of the Cawnpore suit, and this was allowed. In revision, held that the plaintiffs in the Cawnpore suit being the legal representatives of a deceased partner the parties to both the suits could not be treated as the same and therefore S. 10, C. P. Code, was inapplicable.

A. S. Raghava Rao for Petitioner.

M. S. Sarma and *D. R. Krishna Rao* for Respondent.

K.C.

Wadsworth and Patanjali Sastri, JJ. Gavappa *v.* Gundappa and another.
25th August, 1941. **A. S. No. 1 of 1939.**

Madras Agriculturists' Relief Act(IV of 1938)—Question whether defendant was "agriculturist" and if so he was entitled to the benefits under the Act —Decision that he was not "agriculturist"—Reversal on appeal—Proper procedure for working out the benefits under the Act.

The trial Court held that the defendant was not an agriculturist and therefore not entitled to any benefit under Act IV of 1938. The appellate Court reversed the decision and held that he was an agriculturist entitled to the benefits of the Act. On the question whether the suit should be remanded and the appellant given a fresh opportunity to adduce oral and documentary evidence as to appropriations of payments made by him,

Held, that when there was a definite issue framed whether the defendant was an agriculturist and to what benefits he was entitled under the Act, it was his duty to have adduced at the trial itself all evidence regarding this issue and other issues framed in the suit. The appellate Court reversing the finding of the trial Court and holding that the defendant was an agriculturist can itself go into the materials existing on record and give him such benefit as he is entitled to under the Act, and avoid a remand.

V. S. Narasimhachar and *K. S. Chakrapani Rao* for Appellant.

Kasturi Seshagiri Rao for Respondent.

K. S.

Venkataramana Rao, J. Razack *v.* Hussain.
25th August, 1941. **A. A. A. O. No. 167 of 1939.**

Insolvency—Order closing insolvency proceedings—If tantamount to order of discharge—Presumption.

Where all the available property of the insolvent was realised and the sale proceeds distributed among the creditors and the insolvency proceedings

were closed but the order of discharge was not produced and the papers were not available from the Courts below,

Held, that when the Court passed an order closing the insolvency proceedings it must also be presumed to have passed an order discharging the insolvent, and even if it did not, the order closing the proceedings must be deemed to be tantamount to a discharge.

K. S. Rajagopalachari and *V. Seshadri* for Appellant.

A. Sundaram Aiyar for Respondent.

K. S.

Wadsworth and Patanjali Sastri, JJ,
26th August, 1941.

Subramanian Chettiar *v.* Miakhan Rowther.
C.R.P. No. 199 of 1941.

Madras Agriculturists' Relief Act (IV of 1938)—Non-agriculturist surety —If entitled to claim discharge pro tanto *with agriculturist principal-debtor.*

Where the discharge of a principal debtor is brought about not by any voluntary act of the creditor but by the operation of a statute subsequently passed, the surety cannot claim discharge, *pro tanto* with the principal debtor. S. 128 of the Contract Act defines the obligation of the surety on the date of the contract of guarantee. Accordingly a non-agriculturist surety is liable for the whole amount of the debt even though the agriculturist principal-debtor is only liable for the debt as scaled down in accordance with Act IV of 1938.

T. P. Gopalakrishnan for Petitioner.

Mahomed Ibrahim for Respondent.

K.S.

Somayya, J.
27th August, 1941.

Venkatasuubbiah *v.* Venkatasubbiah.
S.A. No. 668 of 1939.

Provincial Insolvency Act (V of 1920), S. 37—Annulment of adjudication —Vesting of debtor's property in person appointed under S. 37—Sale of such property in execution without impleading the appointee—Validity.

Where on annulment of adjudication of the insolvent the property of the debtor vested in the person appointed by the Court under S. 37 of the Provincial Insolvency Act, the only person entitled to represent the estate is the appointee. Accordingly a Court sale in execution without having such appointee on the record is a sale without the estate being represented in the execution proceedings and the purchaser gets no title (Case-law discussed).

T. K Srinivasathathachari and *T. T. Srinivasan* for Appellant.

Kasturi Seshagiri Raa for Respondent.

K.S.

Venkataramana Rao, J.
27th August, 1941.

Subbarayudu *v.* Venkatasubbamma.
C. M. S. A. No. 266 of 1940.

Civil Procedure Code (V of 1908), *S.* 60, *Cl.* (1) (c)—*Exemption from attachment.*

Where it is proved that the attached house is the only house belonging to an agriculturist debtor where he keeps his implements of agriculture and lives, even though the house is situated in a village and away from the

fields, he is entitled to claim exemption from attachment for the house as an agriculturist. I.L.R. 1937 Mad. 777 (F.B.), applied.

K. Krishnamurthy for Appellants.

K. Kotayya for Respondents.

K. S.

Burn, J.
28th August, 1941.

Vathan—Accused.
Crl. R.C. Nos. 547 and 548 of 1941
(Case referred Nos. 33 and 34 of 1941).

Criminal Procedure Code (V of 1898), *S.* 123—*Substantive sentence of imprisonment—If can be made to take effect on expiry of imprisonment imposed under S.* 123, *Cr. P. Code.*

An order directing a substantive sentence of imprisonment to take effect on the expiry of the period of imprisonment imposed under S. 123, Cr. P. Code, is illegal. The substantive sentence must take effect from the date on which it is pronounced.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

Accused not represented.

K.S.

[F.B.]
The Chief Justice, Krishnaswami Aiyangar and Chandrasekhara Aiyar, JJ.
28th August, 1941.

Kanakaratnam *v.* Narasimha Rao.
Appeal No. 426 of 1938.

Hindu Law—Adoption—Widow adopting with consent of sapinda—*Motive of widow—Effect on validity of adoption.*

In South India when once a widow has obtained the consent of the nearest *sapinda*, her motive in making the adoption (for instance, to spite the junior widow) is quite irrelevant and does not affect the validity of the adoption. 37 L.W. 729, overruled.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

Sir Alladi Krishnaswami Aiyar and *B. V. Subramaniam* for Respondent.

K. S.

Abdur Rahman, J.
29th August, 1941.

Peria Negamam Sri Lakshmi Vilasa Draviya Sahaya Nidhi *v.* Varalakshmi Ammal.
S.A. No. 483 of 1941.

Limitation Act (IX of 1908), *Arts.* 120 *and* 62—*Loan by* nidhi *on the security of shares in* nidhi—*Sale of shares and adjustment towards loan—Balance left over—Claim for—Limitation.*

Where a *nidhi* advanced a loan on the security of shares in the *nidhi* and subsequently sold such shares and adjusted the proceeds thereof towards the loan, a claim by the debtor or his representative for the balance left over is governed by Art. 120 and not Art. 62 of the Limitation Act. The jural relationship between the parties is that of pawner and pawnee and the claim is not one for money had and received by the *nidhi* for the use of the debtor.

I.L.R. 44 Mad. 823, distinguished.

B. V. Viswanatha Aiyar for Appellant.

K. V. Ramachandra Aiyar and *S. Thiyagaraja Aiyar* for Respondent.

K. S.

(F.B.)

The Chief Justice, Krishnaswami Aiyangar and Chandrasekhara Aiyar, JJ.
1st September, 1941.

Ramanathan Chettiar
v.
Sellakumara Gounder.
A. S. No. 161 of 1938.

Provincial Insolvency Act (V of 1920), *S.* 28 (2)—*Leave under—Whether necessary for a suit under S.* 53 *of the Transfer of Property Act (IV of* 1882) *by a creditor after the adjudication, to set aside an alienation by the debtor.*

S. 28 (2) of the Provincial Insolvency Act applies only to suits in respect of the property of the insolvent which has vested in the Official Receiver. But where the property has been alienated by the debtor before his adjudication and a suit under S. 53 of the Transfer of Property Act by a creditor to set aside the same is filed, S. 28 (2) of the Provincial Insolvency Act is not applicable and the suit is maintainable without leave of the Insolvency Court. 56 M.L.J. 458, approved. If the Official Assignee or Receiver is impleaded as a party to the suit, leave of the Insolvency Court may be necessary.

K. V. Ramachandra Aiyar and *T. N. Sundaresan* for Appellant.

R. Sundaralingam for Respondent.

K.S.

[F. B.].

The Chief Justice, Krishnaswami Aiyangar and Chandrasekhara Aiyar, JJ.
1st September, 1941.

Vasireddi Venkayya v. Gopu Sriramulu & others.
S. A. No. 803 of 1938.

Hindu Law—Adoption—Assent of sapinda *to adoption by widow in general terms—Adoption in pursuance of—When valid.*

Where there is an assent by a *sapinda* to a widow adopting any boy she liked at any time she liked, the assent expressed in such general terms is valid and an adoption made in pursuance of such assent shortly after the giving of the assent (within five months in the present case) and before there was any material change in the circumstances of the family, is valid. 1 L.W. 511 followed.

The question as to the effect of the lapse of time and change of circumstances in the family on efficacy of assent was left open.

V. Govindarajachari and *T. G. Krishnamurthi* for Appellant.

K. Kameswara Rao for Respondents.

K.S.

Venkataramana Rao, J. Enayathulla *v.* Jeelani.
5th August, 1941. **C. C. C. A. No. 4 of 1940.**

Married Women's Property Act (III of 1874)—S. 6—Applicability to policy of insurance effected in 1905 by a Mahomedan on his life for the benefit of his children.

S. 6 of the Married Women's Property Act is applicable to a policy of insurance effected in 1905 by a Mahomedan male on his own life for the benefit of his wife and children. (I.L.R. 37 Mad. 483), relied on.

If S. 6 of the Act were to apply, a trust is created in favour of the several persons for whose benefit the policies were effected though the interest taken by them was contingent.

Raffiudin Ahmad for Appellant.

O. K. Nambiar and *Short Bewes & Co.* for Respondents.

K.S.

Burn, J. Madanapalli Lakshmikantha Nidhi *v.* Gopalu.
12th August, 1941. **C. R. P. Nos. 1738 of 1939.**

Usurious Loans Act (X of 1918), S. 3—Application of the provisions of the Act—Reasons for, if should be recorded.

The Usurious Loans Act, S. 3 (1) nowhere states that the Court must set out its reasons for applying the provisions of the Act.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Petitioner.

Respondents not represented.

K. S.

Burn, J. Ismal Rowther *v.* Ahmed Rowther.
15th August, 1941. **C. R. P. No. 1728 of 1939.**

Evidence Act (I of 1872), S. 34—Entries in books of account—Sufficiency of as proof of discharge of liability.

The clerk of the defendant had given to the plaintiff a chit showing that on 1st October, 1935 the defendant owed the plaintiff Rs. 177-2-1. In a claim for the amount, the defendant produced his accounts showing that after 1st October, 1935 there had been further dealings between him and the plaintiff, as the result of which he owed the plaintiff nothing.

Held, that the entries in the accounts can be accepted as sufficient proof of the defendant's plea of discharge. There is nothing in S. 34 of the Evidence Act to indicate that entries in books of account may not by themselves be sufficient for this purpose, though they are not, by the terms of the section sufficient to lay upon any person a liability.

T. P. Gopalakrishnan for Petitioner.

V. Somasundaram for Respondent.

K. S.

King, J. Subbamma *v.* Ankireddi.
15th August, 1941. **S. A. No. 1171 of 1938.**

Arbitration—Examination of witnesses essential for decision—Failure of arbitrator to examine witnesses in arriving at a finding—If misconduct invalidating award.

The question of the validity of a settlement deed which was impugned on the ground of undue influence was referred to arbitration. The award

said that the deed was executed under undue influence and was at its inception invalid.

Held, that such an opinion could not be properly arrived at without the examination of witnesses and the arbitrator's failure to examine witnesses amounted to misconduct and consequently the finding was vitiated.

K. Kotayya for Appellant.

A. Ragaviah for Respondent.

K. S.

Chandrasekara Ayyar, J.
18th August, 1941.

Venkatappa Naidu *v.* Annayya Reddi.
S. A. No. 270 of 1939.

C. P. Code, (V of 1908), *S.* 149—*Appeal filed insufficiently stamped—Discretion of Judge to reject without calling on or giving time to appellant to pay deficient court-fee—O. 7, r.* 11—*Not applicable to appeals.*

Under S. 149 of the Civil Procedure Code the District Judge has a discretion to allow deficiency in court-fees on an appeal to be made up and this necessarily means that he could exercise the discretion the other way round and say that it was not a fit case for showing any indulgence to the appellant. The provisions of O. 7, r. 11 are not applicable to appeals.

Decision in 27 M.L. J. 677 held not to be *obiter* and followed.

D. R. Krishna Rao, for Appellant.

N. Somasundaram for Respondent.

K.S.

Venkataramana Rao, J.
19th August, 1941.

Seetarama Aiyar *v.* Subba Aiyar.
A. A. A. O. No. 115 of 1939.

Limitation Act (IX of 1908), *Art.* 180—*Suit for possession by purchaser of immoveable property at sale in execution—Limitation.*

Where it is held that a decree is executable and the sale in execution is confirmed and an appeal against such order is dismissed for default and an application for the restoration of the appeal is also made and dismissed and another appeal against such dismissal for default is preferred to the High Court and ultimately dismissed, an application by the purchaser of immoveable property at the sale in execution for delivery of possession, made within three years of the dismissal of the appeal by the High Court is within time. The sale did not become absolute till the last order of the High Court dismissing the appeal against the order refusing to restore the appeal dismissed for default was made. (I.L.R. 61 Cal. 945, P.C.), relied on.

R. Srinivasa Aiyangar for Appellant.

K. Desikachari for Respondent.

K.S.

Venkataramana Rao, J.
25th August, 1941.

Kunchu Nayar *v.* Chethappan Nayar.
A.A.A.O. No. 209 of 1939.

Civil Procedure Code, (V of 1908), *S.* 48—*Application barred under—If delay can be excused under S.* 5, *Limitation Act.*

Where an application is barred under S. 48, Civil Procedure Code, the Court has no jurisdiction to excuse delay under S. 5 of the Limitation Act which is not applicable to a petition under S. 48, Civil Procedure Code.

P. Govinda Menon for Appellant.

B. V. Viswanatha Aiyar (Amicus curiae).

K.S.

(F.B.)
The Chief Justice, Krishnaswami Aiyangar and Chandrasekhara Ayyar, JJ.
25th August, 1941.

In the matter of a First Grade Pleader.
Reference No. 21 of 1941.

Legal Practitioner—Accepting instructions from a party after receiving instructions from the opposite party—Propriety—Civil Rules of Practice (Madras), r. 20.

Legal Practitioners cannot accept instructions from a party to a suit when they have already received instructions from the opposite party unless the opposite party consents or the pleader is allowed by the Court to act for the other party. This is in fact laid down in r. 20 of the Civil Rules of Practice of the Madras High Court.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) in support of the motion.

V. Suryanarayana for the Pleader.

K.S.

Burn, J.
28th August, 1941.

Venkatachalam Chetty, Accused.
Crl. Appeal No. 357 of 1941.

Penal Code (XLV of 1860), *Ss.* 302 *and* 328—*Victim recovering from* dhatura *poison and then dying of pneumonia—Conviction of accused for murder—Propriety.*

Where the death of the victim was due not to the *dhatura* poison found to have been administered by the accused, but to pneumonia consequent upon exposure occasioned by coma or unconsciousness produced by the poison, and in fact the victim died of pneuomina after recovering from the *dhatura* poisoning the accused ought to be convicted not under S. 302 but under S. 328 of the Indian Penal Code.

I.L.R. 45 All. 557, distinguished.

Accused not represented.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K. S.

The Chief Justice and Chandrasekhara Ayyar, J.
2nd September, 1941.

Nallappa Goundan, Accused.
Crl. R. C. No. 163 of 1941.

Criminal Procedure Code (V of 1898), *S.* 195—*Defamation by person in the witness box—Complaint—If requires sanction of Court.*

The provisions of S. 195, Criminal Procedure Code do not apply to defamation and a person who is defamed by a witness when in the witness box is at liberty to file a complaint against the defamer under the Penal Code and sanction of the Court before which the complainant was defamed is unnecessary.

G. Gopalaswami for Petitioner.

The Public Prosecutor (*V.L. Ethiraj*) for the Crown.

K.S.

The Chief Justice and Chandrasekhara Ayyar, J.
3rd September, 1941.

Official Assignee, Madras *v.* D'Silva.
O. S. A. No. 12 of 1941.

Presidency Towns Insolvency Act (III of 1909), *Ss.* 52 *and* 60—*Insolvent a Government servant receiving salary less than Rs.* 100—*Order for payment of portion for benefit of creditors—When can be passed—Civil Procedure Code (V of* 1908), *S.* 60.

Although future salary of an insolvent did not vest in the Official Assignee, the salary when received by the insolvent would become his property and vest in the Official Assignee. After receipt of the salary the insolvent can be called upon to pay a portion of it for the benefit of his creditors. Though under S. 52 of the Presidency Towns Insolvency Act after acquired properties of the insolvent are divisible among the creditors there is no provision apart from S. 60 empowering the Official Assignee to recover such salary by a prospective order. Such an order under S. 60 of the Presidency Towns Insolvency Act could not be obtained if the salary was within Rs. 100. But this does not affect S. 52 of the Presidency Towns Insolvency Act and it is always open to the Official Assignee to apply for an order for payment of a portion of the money after its receipt by the insolvent. But having regard to the limit imposed by S. 60 of the Act read with S. 60 of the Civil Procedure Code such an order is not likely to be passed except in exceptional circumstances.

K. V. Ramachandra Aiyar, M. A. Srinivasan and *S. Swaminathan* for Appellant.

S.J.S. Fernandes for Respondent.

K.S.

Venkataramana Rao, J. Murugesa Mudali *v.* Ethiraja Mudali.
4th September, 1941. **S. A. Nos. 346 to 355 of 1939.**

Madras Estates Land Act (I of 1908)*, Ss.* 3(5)*,* 77*-A and* 112*—Proceedings initiated by one co-sharer without joining others—Validity.*

The term, landholder, in Ss. 77-A and 112 of the Madras Estates Land Act must have the same meaning as under S. 3 (5) and in the case of a divided family it is not open to the elder brother to represent his minor brother and act as his guardian and it is not competent for one co-sharer to initiate proceedings under S. 112 without joining the other co-sharer.

K. Rajah Aiyar and *V. Seshadri* for Appellant.

S. Jagadisa Aiyar and *G. R. Jagadisan* for Respondent.

K.S.

The Chief Justice and Chandrasekhara Ayyar, J. Province of Madras by the Collector of Madras v. Paidanna and sons.
5th September, 1941. **A. S. No. 102 of 1941.**

Madras General Sales Tax Act (IX of 1939)*, First sales of goods manufactured in the Province—Tax on, is in the nature of excise duty and therefore* ultra vires *the Provincial Government—Government of India Act,* 1935 *—Federal List Entry No.* 45 *and Provincial List Entry No.* 48.

Entry No. 45 in the Federal List and Entry No. 48 in the Provincial List can be reconciled by reading into Entry No. 48 of the Provincial List a power to tax all sales subsequent to the sale by the manufacturer or producer, that is, when the property in the goods has passed beyond the manufacturer or producer and the goods have become part of the general stock of the province. Notwithstanding that the tax imposed by the Madras General Sales Tax Act is based on turnover, it is in fact a tax on sales and in so far as it imposes a tax on first sales of goods manufactured or produced within the province, it is in the nature of excise duty and therefore *ultra vires* the Provincial Legislature.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *N. Rajagopala Aiyangar* for Appellant.

T. R. Venkatarama Sastri instructed by King and *Partridge, V. Govindarajachari* and *V. V. Raghavan* for Respondent,

K.S.

Chandrasekhara Ayyar, J. Abdul Huq Saheb *v.* Usman Khan Sahib.
18th August, 1941. **S.A. No. 236 of 1939.**

Limitation—Sale of immovable property—Promissory note executed by vendee for balance of price due—Payments towards the promissory note and endorsement of acknowledgments—If can save limitation for enforcing vendor's lien.

On a sale of some immovable property the vendee executed a promissory note for the balance of purchase price due to the vendor. Subsequently payments were made towards the amount due under the promissory note and endorsed on the note. A decree was obtained for the balance remaining due under the promissory note. In a subsequent suit to enforce the vendor's lien against another purchaser of the properties in execution of a mortgage decree against the original vendee, twelve years after the original suit,

Held, that the suit was barred by limitation under Art. 132. The acknowledgment of liability in respect of the promissory note cannot save the statutory charge from the bar of limitation. Where two remedies flow either by operation of law or by agreement between the parties out of one and the same transaction and the remedies are separate and distinct in their scope and in their essential features anything said or done to save one of the remedies from the bar of limitation cannot operate by itself to save the other also. 7 Mad. 392; 34 I.C. 417 and 25 Cal. 844 (P.C.), distinguished.

K. V. Sesha Aiyangar for Appellant.

K. S. Narayana Aiyangar for Respondents.

K.S.

Lakshmana Rao, J. Mallayya *v.* Jagannadhamma.
18th August, 1941. **C.R.P. No. 343 of 1940.**

Suit valuation—Suit for partition by persons in joint possession—Valuation for purposes of jurisdiction.

In a suit for partition by persons in joint possession the valuation for the purpose of jurisdiction is the actual market value of the property in suit. 50 Mad. 646, 56 M.L.J. 394 and (1939) 2 M.L.J. 226, relied on. Accordingly where the value of the plaintiffs' shares will be not less than Rs. 10,000 the suit should be instituted in the Subordinate Judge's Court as the District Munsif has no jurisdiction to entertain it.

G. Chandrasekhara Sastri for Petitioner.

P. Satyanarayana Rao and *M. R. Raju* for Respondents.

K.S.

Somayya, J. Chandammal *v.* Ramakrishna Ayya.
19th August, 1941.

S.A. No. 789 of 1939.

Contract Act (IX of 1872), S. 23—Consideration for promissory note, non-prosecution for cheating—Enforceability of the promissory note.

In the case of offences specified in S. 345 (2) of the Criminal Procedure Code the matter may be lawfully compounded before it goes to Court and a promissory note taken in consideration therefor is not void under S. 23 of the Contract Act and is therefore enforceable.

K. Rajah Aiyar and *S. Srinivasachari* for Appellant.

K. Bhimasankaran and *P. Somasundaram* for Respondent.

K.S.

N R C

The Chief Justice and Chandrasekhara Ayyar, J.
20th August, 1941.

Swaminatha Pillai *v.* Krishna Padayachi.
L.P.A. No. 36 of 1940.

Transfer of Property Act (IV of 1882), S. 41—Applicability of principles to movables—Y, one of the judgment-debtors a surety—Y discharging decree and getting it transferred to his benamidar—Bona fide *purchaser of decree for value from benamidar—Right to execute against* Y—*C. P. Code, O. 21, r. 16—Circumvention—Effect.*

Y was a surety for *X* and a decree was obtained against both. To avoid execution proceedings against himself *Y* paid the decree-holder, but in order to recover the amount from the principal debtor without recourse to a fresh suit he ararnged with the decree-holder to transfer the decree to *M*, a benamidar for himself. *M* sold the decree to *K* who acted in good faith for consideration. *K* sought to execute the decree against *Y*,

Held, that *M* being *Y's* benamidar the transfer of the decree to him meant the transfer to *Y* himself and *Y* was guilty of what in law amounts to a fraud to circumvent the provisions of O. 21, r. 16 of the Civil Procedure Code.

The principle embodied in S. 41 of the Transfer of Property Act can be applied to movable property also. Having allowed *M* to hold himself out as the holder of the decree, *Y* cannot be preferred to *K* who bought the decree for valuable consideration and in good faith. Accordingly *Y* cannot avoid liability to pay the decretal amount to *K*.

T. V. Muthukrishna Aiyar for Appellant.

A. C. Sampath Aiyangar for Respondent.

K.S.

The Chief Justice and Chandrasekhara Ayyar, J.
21st August, 1941.

Palaniappa Chettiar *v.* Velappa Chettiar.
L.P.A. No. 24 of 1940.

Mortgage—Earlier mortgage—How far shield against later mortgage—Right if affected by law of limitation.

An earlier mortgage can be held as a shield as against a subsequent mortgage. The right is not affected by the law of limitation and can be set up even after the expiry of 12 years.

41 M.L.J. 399, A.I.R. 1929 Mad. 465, followed. 50 Mad. 626, not followed.

K. V. Krishnaswami Aiyar and *N. R. Govindachari* for Appellant.

T. K. Sundararaman for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
29th August, 1941.

Muthukaruppan Chettiar v. Subbiah Chettiar.
Appeal No. 22 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 7, 8 *and* 4 (*d*)—*Scope.*

On 1—10—1937 there was a debt already contracted on the security of municipal house property alone. By S. 4 (*d*) such debt is excluded from the operation of the Act. The addition of security of other property at a date after the Act came into force cannot retrospectively make it a debt contracted on the security of property other than municipal property so as to bring into force Ss. 7 and 8 of the Act and exclude S. 4 (*d*).

K. Rajah Aiyar and *N. G. Krishna Aiyangar* for Appellant.

R. Gopalaswamy Aiyangar for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. Venkata Reddi *v.*
1st September, 1941. Venkatanarayana.
A.A.O. No. 543 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 8 (1) *and* (3)—*Scope.*

A debtor is not entitled under S. 8 of Act IV of 1938 to split up a debt into its component parts and have scaled down one part under clause (3) and another part of the debt under clause (1).

P. Chandra Reddi and *R. Ramalinga Reddi* for Appellant.

J. R. Gundappa Rao for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. Sri Chittoori Narayanamma
2nd September, 1941. *v.* Vankina Venkatachallam.
A.S. No. 71 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 8—*Scope—Question of benami for creditor, if can be gone into—Mortgage by son in renewal of pre-partition debt on promissory notes by father—Debtors, if same.*

The question of benami cannot be gone into in determining the point whether a creditor is the same within the meaning of the explanation to S. 8 and the creditor mentioned in the document, evidencing the liability to be scaled down, is the creditor for purposes of the Act. Where a mortgage was executed by a son after partition in discharge of pre-partition debts evidenced by promissory notes executed by his father, the debtors in respect of the two liabilities are not the same.

I.L.R. (1941) Mad. 248 and (1940) 2 M.L.J. 756 referred to.

A. Lakshmayya for Appellant.

V. Govindarajachari for Respondent.

B.V.V.

Venkataramana Rao, J. Ballamkondu Venkatiah and another *v.*
3rd September, 1941. Poli Chenchamma and three others.
S.A. No. 737 of 1939.

Registration of Settlement Deed—Fraud on Registration law—Settlement deed not given effect to—Settlor's suit for declaration of title—If Courts can give relief.

Where both the settlor and the settlee got registered a settlement deed by including an item of property not owned by the settlor for purpose of getting registered the settlement deed in a Sub-Registry wherein that item was situate but no effect was given to the Settlement Deed and the settlor continued in possession of the lands and was paying the kist therefor and there was no transfer of patta in favour of the settlee,

Held, that a suit by the settlor against the settlee and his transferees for a declaration of her title is maintainable since the fraud was not carried into effect.

T. K. *Srinivasathathachariar* and *T. T. Srinivasan,* for Appellants.

K. Umamaheswaram and *P. Ramalinga Reddi,* for Respondents.

K.C.

Wadsworth, J. Thirumayee Ammal *v.* Muthu Mooppanar.
4th September, 1941. **C.R.P. No. 1045 of 1939.**

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 4 (*h*)—*Principal of "debt or debts"—Meaning.*

The argument, that for the purpose of S. 4 (*h*) of Madras Act IV of 1938, the principal of the "debt or debts" means the original principal of some antecedent debt or debts, cannot be accepted.

L. V. Krishnaswamy Aiyar for Petitioner.

T. L. Venkatarama Aiyar for Respondent.

K.S.

Chandrasekhara Ayyar, J. Krishnayya *v.* Lakshmidevamma.
5th September, 1941. **Cr. P. No. 132 of 1940.**

Madras Debt Conciliation Act (XI of 1936), S. 25—Conduct of defendant in filing petition before Board improper or fraudulent—If ground for refusal of stay application under S. 25.

The prohibition under S. 25 of the Debt Conciliation Act is absolute and the Courts have no power to proceed with a suit on the ground that the conduct of the defendant in filing a petition before the Board was improper or fraudulent.

V. Suryanarayana for Petitioner.

P. Somasundaram and *P. Suryanarayana* for Respondent.

K.S.

Venkataramana Rao, J. Ramanathan Chettiar, *In re.*
8th September, 1941. **S.R. No. 16499 of 1941.**

Court-Fees Act (VII of 1870), Sch. II, Art. 1 (d) (i) (Madras Amendment)—Order directing a rateable decree-holder to refund sum of Rs. 987-3-11 received by him—Suit in which sale proceeds realised valued at more than Rs. 1,000—Revision petition—Proper court-fee.

A memorandum of civil revision petition presented to the High Court against an order directing a decree-holder to refund a sum of Rs. 987-3-11 received by him in rateable distribution is liable to pay a court-fee of Rs. 10 and not Rs. 5 where the value of the suit wherein the sale proceeds were realised in execution of the decree is above the value of Rs. 1,000.

K. S. Ramabhadra Aiyar for Petitioner.

K.S.

[F.B.]

The Chief Justice, Gentle and Somayya, JJ. *In re* a Pleader.
8th September, 1941. **R.C. No. 20 of 1941.**

Legal practitioner—Filing certificate that he had received fees without really receiving the same from client—Whether misconduct.

The filing by a legal practitioner of a certificate in Court that he had received fees from his client, while in fact he did not receive any fees, amounts to professional misconduct.

The Advocate-General in support of the motion.

V. Govindarajachari for the Pleader.

K.S.

Wadsworth, J. Chatha Nayar *v.* Janaki Amma.
8th September, 1941. **A.A.A.O. No. 205 of 1940.**

Practice—Non-appealable order—Appeal reversing—Further appeal—Competence—Power in second appeal to revise trial Court's order.

The Court has power to entertain a second appeal from an appellate decision when no appeal lay to the lower appellate Court. 45 Cal. 926; 13 All. 575 and 57 Mad. 777, relied on. The High Court can *suo motu* revise the trial Court's order and rectify it in such a second appeal.

1932 M.W.N. 1244 applied.

K. P. Ramakrishna Aiyar for Appellant.

K. Kuttikrishna Menon for Respondent.

K.S.

Wadsworth, J.
8th September, 1941.

Krishna Rao *v.* The Official Receiver, East Godavari.
C.R.P. No. 2258 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 20 *and* 21—*Provincial Insolvency Act, S.* 68—*Stay of sale at the instance of the insolvent—Sale held by public auction*—Locus standi *of the insolvent to apply for setting aside the sale.*

The equity of redemption in certain properties was advertised for sale by the Official Receiver. The insolvent filed an application on 14—9—1938 without impleading the Official Receiver for a declaration that he was an agriculturist and that his debts should be scaled down. On 27—9—1938 he applied for stay of sale under S. 20 of the Madras Act IV of 1938. The stay was refused and the sale was held on 27—9—1938. The insolvent filed an application under S. 68 of the Provincial Insolvency Act to set aside the sale. The Insolvency Court held that the application was not maintainable in law as the insolvent cannot be a person aggrieved within the meaning of S. 68. The lower appellate Court held that by virtue of Ss. 20 and 21 of the Madras Act IV of 1938 the insolvent was competent to apply and have the sale set aside.

Held, that the applications for scaling down the debt without impleading the Official Receiver and for stay under S. 20 by the insolvent were irregular and incompetent and that the insolvent had no right to seek to set aside the sale though in a proper case the Full Bench decision in 49 Mad. 461, might not bar the insolvent.

A. Lakshmayya for Petitioner.

V. Viyyanna for Respondent.

K.S.

Venkataramana Rao, J.
12th September, 1941.

Thiruvengadam Pillai and others *v.* Koolai *alias* Muthusami Pillai and others.
S.A. No. 471 of 1939.

Revenue Recovery Act (I of 1890)—*Death of registered proprietor before the date fixed for sale for recovery of arrears of revenue—Failure to serve notices of sale on the legal representatives—Effect on the validity of sale.*

It is the defaulter's interest that is brought to sale under the Revenue Recovery Act and there should be a person capable of averting the sale till the date of the sale. Accordingly where the registered ryotwari pattadar dies before the date fixed for sale for arrears of revenue the proper course for the revenue authorities would be to register the heirs of the deceased as owners in the revenue registers, serve notices on them or start the whole proceedings *de novo*. A sale without following such a course passes no title to the purchaser.

S. Parthasarathy and *V. K. Thiruvenkatachari* for Appellants.

T. V. Muthukrishna Aiyar for Respondents.

K.S.

Horwill, J.
12*th September*, 1941.

Ganapathisa and others.
Crl. App. Nos. 367 and 374 of 1941.

Madras Gaming Act (III of 1913).—*Keeping common gaming house—Gambling materials found—Presumption—Proof of absence of actual betting—Use of place after races for calculation for payment—If offence.*

The use of a place for making calculations for payment out after the results of the race would not in itself constitute an offence. The presump-

tion under the law that a certain place was kept or used as a common gaming house if gambling materials were found there, is displaced if it is proved that there was no actual betting in that place.

K. S. Jayarama Aiyar and *N. Krishnamurthy* for Accused.

The Crown Prosecutor (*P. Govinda Menon*) and *C. D. Venkataraman* for the Crown.

K.S.

[S.B.]

The Chief Justice, Wadsworth and Patanjali Sastri, JJ.
15th September, 1941.

Commissioner of Income-tax *v.* Maharaja of Pithapuram.
O.P. No. 31 of 1941.

Income-tax Act (1939), *S.* 16, *sub-S.* (1), *Cl.* (*c*)—*Scope and applicability.*

The income for 1938-1939 derived from the assets comprised in revocable instruments of trust and settlement executed by an assessee in favour of his delegators on April 5, 1933, before the commencement of the Income-tax Act of 1939 can be deemed to be the income of the assessee under revocable transfers of assets as contemplated by Cl. (*c*) of sub-S. (1) of S. 16 of the Income-tax Act. Such a transferor can be assessed on that income.

K. V. Sesha Aiyangar for the Commissioner of Income-tax.

Ch. Raghava Rao, V. V. Sastri and *G. C. Venkatasubba Rao* for the Assessee.

K.S.

[F.B.]

The Chief Justice, Wadsworth and Patanjali Sastri JJ.
16th September, 1941.

Sriramareddi *v.* Sriramareddi.
C.M.P. Nos. 4772 and 4773 of 1941.

Madras Agriculturists' Relief Act (*IV of* 1938)—*Appeal*—*Application for scaling down after judgment on appeal and before passing decree*—*Maintainability*—*Remitting application for scaling down to trial Court after disposal of appeal*—*Propriety.*

Unless an application for scaling down is filed before the pronouncement of the judgment on appeal it cannot be entertained afterwards and the drafting of the decree suspended. The proper procedure on an application for scaling down a decree filed before the appellate Court will be to call for a report from the lower Court and pass a final decree after its receipt. It is wrong to remit an application for scaling down a decree to the lower Court after the disposal of the appeal itself.

51 L.W. 606 overruled.

V. Govindarajachari and *P. Satyanarayana Raju* for Petitioner.

V. Viyyanna for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. 25th August, 1941. — Satyanarayana v. Veereswara Sastrulu. App. No. 187 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (d)—Personal covenant in mortgage of house property within municipality—If takes the case out of the exception in S. 4 (d).

The fact that by reason of the personal covenant contained in a mortgage of house property alone in a municipality, the debt might be enforced against the other property belonging to the judgment-debtor cannot make it a debt not contracted on the security of house property alone in a municipality. If and when a personal decree is passed, it may be open to the judgment-debtor to contend that the liability under the personal decree is not one within the exception contained in S. 4 (d) of Act IV of 1938; but this question was left open by their Lordships.

M. S. Ramachandra Rao for Appellant.

N. Vasudeva Rao for Respondents.

K.S.

Somayya, J. 1st September, 1941. — Secretary of State for India v. Dhupjee. S.A. No. 508 of 1939.

Madras Land Encroachment Act (III of 1905) S. 9—Penal assessment under—Sale of land for recovery—If prevails over prior encumbrances.

S. 9 of the Madras Land Encroachment Act III of 1905 equates the penal assessment levied under it to land revenue and provides that it may be recovered as land revenue. The sale of the defaulter's property for recovery of such assessment passes the property free of all encumbrances, as S. 42 of Madras Act II of 1864 applies to the sale.

The Government Solicitor for Appellant.

G. Chandrasekhara Sastri, for Respondent.

K.S.

The Chief Justice and Chandrasekhara Ayyar, J. 2nd September, 1941. — Venkatachalam Chetty v. Venkataraghavachari. O.S.A. No. 5 of 1940.

Transfer of Property Act (IV of 1882), S. 53—Scope.

A transaction may be set aside under the provisions of S. 53 of the Transfer of Property Act even where full consideration has passed, if it has been entered into with the object of defeating creditors.

V. S. Rangachari and *P. Chandra Reddi* for Appellant.

P. R. Sundaresan, A. Seshachari and *M. Sham Das* for Respondents.

K.S.

Chandrasekhara Ayyar, J. 8th September, 1941. — Niladri Raju v. Ramanna. C.R.P. No. 1354 of 1941.

Court-Fees Act (VII of 1870), S. 7, Sch. IV-A (as amended by Madras Act V of 1922))—Suit for setting aside mortgage decree regarding only 2 out of various items—Proper court-fee payable.

A suit which though in form is for a declaration of the plaintiffs' interest in some specified properties is in reality one for setting aside a mortgage decree obtained against them by the defendant falls within S. 7, Sch. IV (A) of the Court-Fees Act as amended by the Madras Court-Fees Act V of 1922. Where the plaintiff's are interested only in two out of a number of properties covered by the mortgage decree for a large sum of money, which is sought to be set aside only so far as those two properties are concerned, it is suffi-

cient to pay court-fee on the market value of those two properties and it is not necessary to pay court-fees on the entire decree amount."

P. Satyanarayana Rao and *M. R. Raju* for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *P. Somasundaram* for Respondent.

K.S.

Wadsworth, J. Padmanabhudu *v.* Narasimham.
9th September, 1941. **C.R.P. No. 132 of 1941.**

Madras Agriculturists' Relief Act (IV of 1938), S. 20—Inordinate delay in deciding petition under O. 21, r. 90, C. P. Code preventing execution—If ground for refusing stay under S. 20 of Act IV of 1938.

That the execution of the decree had been prevented by considerable delay in deciding the petition preferred under O. 21, r. 90, C. P. Code is no ground for refusing a stay to which the debtor is entitled under the provisions of S. 20 of Act IV of 1938. The confirmation of sale after the Act came into force would render the application to be filed under S. 19 infructuous and therefore stay must be granted.

V. Viyanna for Petitioner.

K. Kotayya for Respondent.

K.S.

Somayya, J. Tirumalai Tirupathi Devasthanam
9th September, 1941. *v.* Tirupathi Municipal Council.
S.A. No. 53 of 1939.

Madras District Municipalities Act (V of 1920), S. 82, Cl. (2)—Cost of constructing compound walls—If can be taken into consideration in fixing the annual value of the premises for taxation.

Having regard to the purpose and intendment of the Madras District Municipalities Act and proviso to Cl. (2) of S. 82, compound walls form part of the building and the cost of constructing the compound walls should also be taken into consideration for fixing the annual value of the premises for purposes of assessment.

V. Govindarajachari for Appellant.

N. Gopala Menon and *C. S. Govindaswami* for Respondent.

K.S.

Wadsworth, J. Venkatarami Reddi Garu
9th September, 1941. *v.* Satyanarayana Reddi.
A.A.O. No. 138 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 4—Applicability.

Where an executor did not pay a legacy but used the amount for his own purposes giving the legatee a memorandum for the amount so appropriated the legatee's suit for recovery of the amount set forth in the memorandum is clearly one to enforce a liability protected under S. 4 of Act IV of 1938.

Ch. Raghava Rao and *S. Kothandarama Nayanar* for Appellant.

A. C. Sampath Aiyangar for Respondent.

K.S.

Somayya, J. Chinnappa Reddi *v.*
9th September, 1941. Venkataramanappa.
S.A. No. 803 of 1939.

Transfer of Property Act (IV of 1882), Ss. 6 (e) and 130—Right to sue for refund of purchase money for breach of covenant for title on sale of land—If actionable claim.

The first defendant sold some properties to the defendants 2 and 3 on 27—7—1929. In 1935 two persons sued the defendants 2 and 3 and obtained a decree for recovery of those properties on the ground that they belonged to them. The defendants 2 and 3 purported to sell to the plaintiff their right for refund of the purchase-money.

It was contended that the right sold was a mere right to sue for damages for breach of covenant for title and was not assignable to the plaintiff under S. 6 (*e*), T.P.Act.

Held, that what was assigned was an actionable claim and not a mere right to sue for damages. 11 Pat. 266 (P.C.), followed.

A. Lakshmayya for Appellant.

K. Krishnaswami Aiyangar and *N. Koteswara Rao* for Respondents.

K.S.

Wadsworth, J. Kallalagar Devasthanam v. Baskaram Pillai.
10th September, 1941. **C.M.S.A. No. 190 of 1939.**

Practice—Second appeal against appellate order affirming a non-appealable order—Competence.

Where an appellate Court affirms a non-appealable order a second appeal is not maintainable.

K. V. Srinivasa Aiyar for Appellant.

R. Venkataraman and *S. Viswanathan* for Respondents.

K.S.

Burn, J. Ramaswami Padayachi (Petitioner).
12th September, 1941. **C.R.P. No. 1944 of 1941.**

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 19 *and* 20—*Scope.*

The purpose of S. 20 of Madras Act IV of 1938 is to give a judgment-debtor a chance of making an application under S. 19 of the Act. Where no application for scaling down has been made even long after the filing of the application under S. 20 for stay, and the debtor prefers to go on prosecuting his application only for stay of execution, the High Court will not interfere in revision against an order dismissing the stay application.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram Aiyar* for Petitioner.

K.S.

[S.B.]
The Chief Justice, Wadsworth and Patanjali Sastri, JJ. Commissioner of Income-tax, Madras *v.* Lakshmanier.
15th September, 1941. **O.P. No. 96 of 1941.**

Income-tax Act (*XI* of 1922), *S.* 16 (3) (*a*) (*ii*)—*Applicability.*

Where a Hindu father and his sons—of whom three were minors—who were members of an undivided family were partners in two firms the provisions of S. 16 (3) (*a*) (*ii*) of the Income-tax Act applies and the minors' share of the profits can be included in the total income of the father for assessment of income-tax.

T. M. Krishnaswami Aiyar, M. Subbaroya Aiyar and *T. V. Viswanatha Aiyar* for Assessee.

K. V. Sesha Aiyangar for Income-tax Commissioner.

K.S.

[S.B.]

The Chief Justice, Wadsworth and Patanjali Sastri, JJ.
15th September, 1941.

Ramaswami Chetty v. Commissioner of Income-tax, Madras.
O.P. No. 96 of 1941.

Income-Tax Act (XI of 1922), S. 2 (6-A)—Bonus shares in lieu of profits issued by limited company—If "dividend".

Bonus shares issued in lieu of profits by a limited company cannot be treated as "dividend" under the Income-Tax Act as they did not amount to a release of the assets of the company. Though the company's profits have been taxed at the maximum rate the assessee is not entitled to claim a refund of the difference between the appropriate rate for him and the maximum rate.

M. Subbaroya Aiyar for Assessee.

K. V. Sesha Aiyangar for Income-Tax Commissioner.

K.S.

[S. B.]

The Chief Justice, Wadsworth and Patanjali Sastri, JJ.
15th September, 1941.

Annamalai Chettiar v. Commissioner of Income-tax, Madras.
O.P. No. 52 of 1941.

Income-Tax Act (XI of 1922)—Foreign profits remitted to British India—Subsequent incurring of losses—If changes the character of remittance already made.

Where profits were available for remittance and were remitted from Penang into British India, the subsequent incurring of losses after the date of remittance will not alter the character of the remittance made and such remittance made as profits is liable to assessment to Income-tax.

M. *Subbaroya Aiyar* for Assessee.

K. V. Sesha Aiyangar and *C. Rama Rao Saheb* for Income-tax Commissioner.

K.S.

Burn, J.
16th September, 1941.

Syed Sahib Jan Sahib v. Khairunnissa Begum.
C.M.A. No. 423 of 1939.

Civil Procedure Code (V of 1908), O. 43, r. 1 (s)—Order dismissing a receiver—Not appealable.

No appeal lies from an order dismissing a receiver under O. 43, r. 1 (*s*) of the Civil Procedure Code. I.L.R. 54 Cal. 319, not followed.

T. R. Srinivasa Aiyar for Appellant.

R. Venkataraman and *S. Viswanathan* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
17th September, 1941.

Anantamma v. Rama Rao.
C.M.A. Nos. 532 and 533 of 1939.

Madras Agriculturists' Relief Act (IV of 1938)—Construction of S. 4 (h) of the Act.

Plaintiff, a woman obtained in 1936 a decree for Rs. 14,500 and costs amounting to Rs. 1,450. The judgment-debtor applied for scaling down the said debt, and it was admitted that the original principal was only Rs. 2,000. The plaintiff claimed protection under S. 4 (*h*) of the Act.

Held, that the plaintiff was not entitled to the protection claimed as the sum of Rs. 2,000 original principal borrowed together with the costs Rs. 1,450 awarded to her under the decree amounted to more than Rs. 3,000 and therefore the decree debt was liable to be scaled down.

V. Govindarajachari and *V. Nagaramiah* for Appellants.

Kasturi Seshagiri Rao for *D. Suryaprakasa Rao* for Respondent.

K.S.

[F.B.]
The Chief Justice,
Gentle and Somayya, JJ.
17th September, 1941.

Narasimhacharyulu *v.*
Secretary of State for India.
L.P.A. No. 25 of 1940.

Madras Revenue Recovery Act (*II of* 1864), *S.* 59—*Period of six months for appeal—Computation.*

The period of six months provided in S. 59 of the Madras Revenue Recovery Act for an appeal must be computed from the date when the Collector finally declined to interfere in revision when alone the cause of action could be said to have arisen, and not from the date when the Deputy Collector confirmed the revenue sale. 30 Mad. 367, overruled. 23 Cal. 775 and 43 Mad. 185 (F.B.), relied on.

V. Rangachariar and *K. V. Rangachari* for appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for the Government.

P. Somasundaram and *P. Suryanarayana* for Respondents.

K.S.

Horwill, J.
17th September, 1941.

Chinnathambi and another, accused.
Cr.R.P. No. 641 of 1941.

Criminal Procedure Code (*V of* 1898), *Ss.* 369 *and* 421—*Appeal—Absence of appellant and his counsel when appeal taken up for hearing—Dismissal of appeal after perusal of records—Necessity to give reasons in the judgment.*

Where in an appeal by accused against their conviction neither the accused nor their counsel were present in Court when the appeal came on for hearing and the Joint Magistrate dismissed the appeal stating that he had perused the records and found that there were no grounds to interfere with the lower Court's decision,

Held, on revision, that the judgment would have been unexceptionable if the appeal had been dismissed *in limine* under S. 421 of the Cr.P.Code. As that had not been done the reasons for the conclusions arrived at in the judgment ought to have been stated in the judgment.

T. S. Venkataraman for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor for the Crown.

K.S.

[F.B.]
The Chief Justice,
Gentle and Somayya, JJ.
19th September, 1941.

Rangasami Aiyangar *v.*
Sivaprakasam Pillai.
S.A. No. 993 of 1937.

Limitation Act (*IX of* 1908), *S.* 20—*Payment made by one brother after partition towards promissory note by himself and his deceased father who were members of a coparcenary—If keeps the debt as against his brothers alive.*

At a partition between three sons after the death of the father a promissory note executed by the father and his youngest son was directed to be paid by such son who accordingly made a payment of interest in June, 1933 and endorsed the same on the promissory note. In a suit brought within three years of such payment against all the three sons,

Held, that the payment by the youngest brother did not save limitation as against the other brothers as even before partition the youngest brother had no right to represent the family. 38 Mad. 968, approved.

N. R. Sesha Aiyar for Appellants.

S. Sankara Aiyar for Respondent.

K.S.

Kunhiraman, J.
19*th September*, 1941.

Venkataramayya *v.* Lingayya.
C.R.P. No. 31 of 1941.

Provincial Small Cause Courts Act (*IX of* 1887), *S.* 17—*Application under—Essentials.*

Where a defendant who filed an application to set aside an *ex parte* decree under S. 17 of the Provincial Small Cause Courts Act does not deposit the decretal amount but files a security bond for the amount of any decree that might ultimately be passed, without obtaining the previous directions of the Court, which is a condition precedent, the application is vitally defective and must be dismissed.

T. Rajagopalan for Petitioners.

N. V. B. Shankara Rao for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
22*nd September*, 1941.

Karuppa Goundan *v.* T.R. Narayanaswami Naidu & Co.
S.A. No. 764 of 1940.

Madras Agriculturists' Relief Act (*IV of* 1938), *Ss.* 3 *and* 8—*Endorsee of pronote—If "creditor"—Pronote partly for cash consideration and partly for interest due under a mortgage—Scaling down.*

A pronote which was made up partly of cash consideration and partly of interest due under a mortgage was sought to be scaled down as against an endorsee of the note.

Held, that the endorsee of the pronote came within the definition of the word "creditor" and that he was an assignee of the promisee. S. 120 of the Negotiable Instruments Act did not prevent the setting up of a discharge by virtue of a subsequent statute to the extent that the pronote was for interest on the mortgage. Certificate under S. 205 of the Government of India Act for leave to appeal to Federal Court granted. (1939) 1 M.L.J. 272 (F.B.), followed.

S. Ramachandra Aiyar and *M. Krishna Bharathi* for Appellant.

K. S. Sankara Aiyar and *T. B. Balagopal* for Respondent.

K.S.

The Chief Justice and Chandrasekhara Aiyar, J.
2nd September, 1941.

Lakshmana Samantho *v.* Harischandra Jagat Dev.
Appeal No. 267 of 1938.

Hindu law—Son of kshatriya male and sudra woman—Status.

The son of a kshatriya male and a sudra woman is not a sudra but a ugra, that is, he is of a caste higher than that of his mother and lower than that of his father.

I.L.R. 12 Madras 72 followed.

Accordingly the sons of such an ugra by a permanently kept concubine are not entitled to claim shares in their father's estate but are only entitled to maintenance.

T. R. Venkatarama Sastri and *B. Jagannadha Das* for Appellant.

The Advocate-General (*Sir A. Krishnaswami Aiyar*), *C. Sambasiva Rao, C. Siva Rao* and *G. Chandrasekhara Sastri* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
5th September, 1941.

Thayyanayaki Ammal *v.* Sundarappa.
Appeal No. 436 of 1938.

Limitation Act (IX of 1908), S. 20—Part payment by mortgagor who has parted with the mortgaged property—If saves right of suit against the purchaser of the equity of redemption.

In *Pavayi* v. *Palanivela,* I.L.R. (1940) Mad. 872=(1940) 1 M.L.J. 766 (F.B.), the question was whether for purposes of S. 19, (which requires that an acknowledgment of liability in respect of any property or right must, in order to be effective, be given by "the party against whom such property or right is claimed or by some person through whom he derives title or liability") the derivation of title or liability should take place after the acknowledgment has been given, and it was held that it should. But no such question can arise on the language of S. 20 which unlike S. 19 does not require that interest or part of the principal should be paid by the party against whom the debt or legacy is claimed or by some person through whom he derives title or liability. S. 20 simply enacts that a fresh period of limitation shall be computed where interest or part of the principal has been paid by the person liable to pay or by the debtor. Payment stands on a different footing from acknowledgment as regards its effect in saving rights of action. Accordingly part payment by a mortgagor under his personal liability after he has parted with the mortgaged properties saves the right of suit against the purchaser of the equity of redemption from the bar of limitation.

K. V. Krishnaswami Aiyar for Appellant.

C. A. Seshagiri Sastri, M. Krishna Bharathi, V. Natesan, S. Swaminathan, P. R. Srinivasan, K. Srinivasan and *M. S. Venkatarama Aiyar* for Respondents.

K.S.

Wadsworth, J.
9th September, 1941.

Venkitachala Aiyar *v.* Madhavan.
C.R.P. No. 2423 of 1939.

Village Courts Act (I of 1899), S. 73—Mere illegality of order—If confers jurisdiction on District Munsif under S. 73.

Mere illegality of the village court's order does not confer jurisdiction upon the District Munsif under S. 73 of the Village Courts Act and he cannot clutch at jurisdiction by describing as unjust that which in truth he merely finds to be illegal.

N R C

N. A. Krishna Aiyar and *N. K. Anantapadmanabhan* for Petitioner.

K. V. Gopalakrishnan for Respondent.

K.S.

Lakshmana Rao, J. Puthiapurayil *v.* Puthiapurayil.
9th September, 1941. **C.R.P. No. 524 of 1941.**

The Mappilla Marumakkathayam Act (XVII of 1939), S. 20 (1)—Scope.

The view that orders cannot be passed on a petition under S. 20 (1) of the Mappilla Marumakkathayam Act, until the suit for partition under Chapter III of the Act has been finally disposed of, is opposed to S. 20 (3) which requires proceeding under Chapter III to be stayed during the pendency of the petition under S. 20 (1) and hence such view is not sustainable.

B. Pocker for Petitioner.

D. A. Krishna Variar for Respondent.

K.S.

Wadsworth, J. Ramanadham *v.* Achamma.
10th September, 1941. **C.R.P. No. 2386 of 1939.**

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (f)—Liability of father arising out of breach of trust—Liability of son after father's death out of his share of family property—Not protected by S. 4 (f).

The liability of a son arising out of his pious obligation to discharge his father's debt originally arising out of a breach of trust is not protected by S. 4 (*f*) of Act IV of 1938, and accordingly, it can be scaled down.

Decision in A.S. No. 252 of 1938 followed.

V. Parthasarathi for Petitioner.

P. Somasundaram and *P. Suryanarayana* for Respondents.

K.S.

Chandrasekhara Aiyar, J. Rajah of Venkatagiri *v.* Nagi Reddy.
15th September, 1941. **C.R.P. No. 216 of 1940.**

Civil Procedure Code (V of 1908), O. 21, r. 43 (b)—Applicability to proceedings before Revenue Courts in execution of rent decrees.

O. 21, r. 43 (*b*) of the C. P. Code applies to proceedings before Revenue Courts in execution of rent decrees and the Court can award feeding charges in respect of cattle that were attached by a decree-holder and left in the custody of the Village Munsiff pending further orders in that application. Where such an order is made by the lower Court under S. 151 of the C. P. Code, it can be treated as one on an application under O. 21, r. 43 (*b*) and affirmed on appeal. The person who holds the livestock pending attachment proceedings holds them on behalf of the Court and not on behalf of any party to the proceedings and the person in charge will be deemed to be an officer of Court.

P. V. Rajamannar and *K. Subba Rao* for Petitioner.

K. Umamaheswaran for Respondent.

K.S.

Chandrasekhara Aiyar, J. Ananthasami Reddiar *v.* Swamikannu Naicker.
16th September, 1941. **C.R.P. No. 1977 of 1939.**

Civil Procedure Code (V of 1908), O. 21, r. 92 (1)—Order holding that petitioner had locus standi, *to present the application and making consequential order that sale be set aside—Applicability of O. 43, r. 1 (j)—No revision lies.*

Where under O. 21, r. 92 (1), C. P. C., the Court holds that the petitioner had *locus standi* to present the application and makes the consequential order that the sale be set aside the order is a single one setting aside the sale and O. 43, r. 1 (*j*) confers a right of appeal. It is not permissible to divide the order into two parts and as there is a right of appeal a revision does not lie.

44 Mad. 554; 17 L.W. 680 and 38 Mad. 775 distinguished.

A. C. Sampath Aiyangar for Petitioner.

G. N. Thirumalachariar for Respondent.

K.S.

Abdur Rahman, J.
19th September, 1941.

Narayana Reddiar, Petitioner.
C.R.P. No. 424 of 1940.

Court-Fees—Rejection of insufficiently stamped plaint—Application for review with tender of deficit court-fee rejected—Right to refund of deficit court-fee tendered—Inherent power to direct certificate for refund under C.P. Code, S. 151.

After the rejection of an insufficiently stamped plaint the plaintiff put in an application for review and put in a court-fee of Rs. 183-14-0 for deficient court-fee. The court-fee stamps were cancelled as soon as they were put in. But the review application was rejected.

Held, that on the rejection of the application for review the Court should grant a certificate to the plaintiff authorising him to receive the amount which he had paid. 6 Pat. 602, distinguished.

Though Ss. 13, 14 or 15 of the Court-Fees Act have no application the court-fee can be refunded under the inherent powers of the Court under S. 151, C.P.Code.

T. E. Ramabhadrachariar for Petitioner.

The Government Pleader for Respondent.

K.S.

Venkataramana Rao, J.
19th September, 1941.

Muthukumara Maniagarar and another
v. Petha Maniagarar.
S.A. No. 167 of 1939.

Madras Estates Land Act (I of 1908), Chapter VI—Sales under for arrears of rent—Civil Procedure Code (V of 1908), S. 66—Not applicable.

Rent sales are governed by the special provisions of the Estates Land Act, Chapter VI and certificates of sale are issued under S. 124 thereof. S. 66 of the C. P. Code has no application to such sales and it does not operate as a bar to a suit for a declaration that a certain person was a benami purchaser for the decree-holder. 51 M. 76, relied on; 54 M.L.J. 462 (P.C.), distinguished.

A. Swaminatha Aiyar and *S. Thiagarajan* for Appellant.

C. S. Rajappa for Respondents.

K.S.

Burn and Happell, JJ.
19th September, 1941.

Saiyid Muhammed Sahib *v.*
Subramanyan Chettiar.
Appeal No. 65 of 1937.

Civil Procedure Code (V of 1908), S. 35 (2)—Dismissal of claim suit—Defendant making in his written statement allegations of a more exten-

sive nature than he was able to establish—If sufficient reason for disallowing defendant's costs.

The onus of making out his case always lies upon the plaintiff in a claim suit, and if he fails to make out his case his suit has to be dismissed and the fact that the defendant in his written statement has made allegations of a more extensive nature than he was able to establish is not a sufficient reason for disallowing the defendants costs.

T. K. Sundararaman for Appellant.

K. S. Venkatarama Aiyar for Respondent.

K.S.

The Chief Justice and Chandrasekhara Ayyar, J.
25th September, 1941.

Parmanandha Doss Chota Doss and Sons *v.* Nannu Lal Kanji and others.
O.S.A. No. 18 of 1940.

Transfer of Property Act (IV of 1882), S. 69—Mortgagee's power of sale without the intervention of the Court—If could be conferred by the manager of a joint Hindu family.

The mortgagee's power of sale without the intervention of the Court which is specified in S. 69 of the Transfer of Property Act is a power which is incidental to the mortgage itself. Accordingly the manager of a joint Hindu family can validly confer such a power on his mortgagee, if the mortgage effected by him is itself valid as supported by necessity.

V. V. Srinivasa Aiyangar, M.S. Venkatarama Aiyar, L. Krishna Das, K. Rajah Aiyar and *V. Seshadri* for Appellants.

K. Bhashyam, S. P. Duraiswami, S. Ramanujachari, K.P. Bhat and *M. Sundaram Aiyar* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
30th September, 1941.

Dosapati Ramayya *v.* Pattam Anjayya.
C.R.P. No. 146 of 1941.

Limitation Act (IX of 1908), Ss. 19 and 20—Open payments endorsed on pronote—How far acknowledgement.

The Privy Council decision in 21 Lah. 470 is not an authority for or against the view that where there was a payment endorsed in such terms as to make it ineffective for the purposes of S. 20 of the Limitation Act, it might by implication amount to such an acknowledgment as would save limitation under S. 19. Where there is an endorsement to the effect "*towards the debt*" in the bond or "*towards the note*" or in such equally open language, it is legitimate to read the words of the endorsement together with the substance of the document upon which the endorsement was made and infer from the circumstances the fact that the writing of the endorsement was an acknowledgment of the subsistence of the debt.

V. Rangachari for Petitioner.

Y. G. Krishnamurthi for Respondent.

K.S.

Wadsworth, J. Seethai Janaki *v.* Lakshmi Authinatha Aiyangar.
9th September, 1941. **C.R.P. No. 2346 of 1939.**

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8 and 9 (proviso)—Pronote executed in favour of mother for amount due to her sons as interest on earlier mortgage—Mother not same creditor as the creditor under the mortgage.

A promissory note was executed in favour of a mother for an amount due by defendant to her sons as interest on an earlier mortgage.

Held, that the mother cannot be said to be the same creditor as the creditor under the mortgage and the explanation to S. 8 and the proviso to S. 9 of Act IV of 1938 will have no application, and only the interest on the note can be scaled down under S. 9.

P. N. Appuswami Aiyar for Petitioner.

K. Venkateswaran for Respondent.

K.S.

Wadsworth, J. Kannan *v.* Kunhiraman.
11th September, 1941. **C.R.P. No. 2482 of 1939.**

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Preliminary decree on mortgage passed before commencement of Act IV of 1938—Liability to be scaled down.

A preliminary decree on a mortgage passed prior to the commencement of Act IV of 1938 can be scaled down under S. 19.

K. Kuttikrishna Menon and *K. Govindan* for Petitioner.

P. Govinda Menon and *K. N. Kumaran* for Respondent.

K.S.

Somayya, J. Muni Reddi *v.* Chengal Reddi.
16th September, 1941. **S.A. No. 787 of 1940.**

Madras Estates Land Act (I of 1908), S. 146—Scope.

There is nothing in the Estates Land Act or in the general law which precludes the real owner from filing a suit for a declaration that his property has not been validly sold by the landholder. The only effect of S. 146 is to render the proceedings taken against the pattadar binding on the real owner. There is nothing to prevent the real owner from showing that the sale is vitiated because the necessary steps were not taken even against the pattadar. Where the sale is held at a village different from the one in which it was proclaimed for sale the sale is vitiated.

V. Govindarajachari for Appellant.

S. A. Seshadri Aiyangar for Respondent.

K.S.

Horwill, J. Muthuveeran Chettiar and others
17th September, 1941. *v.* Mottayan Chettiar.
Cr.R.C. No. 694 of 1941 and
(Cr.R.P. No. 652 of 1941.)

Companies Act (VII of 1913), S. 4—Offence under—Magistrate's power to drop proceedings initiated by him—S. 4 (5) of Companies Act if retrospective—Power of Magistrate to take cognizance of the offence on private complaint.

Where proceedings are initiated for an offence under S. 4 (2) of the Companies Act the Magistrate can drop the proceedings if he finds that he ought not to have taken cognizance of the offence.

The members of an association cannot be punished under S. 4 (5) for having formed themselves into a company, association or partnership in

contravention of S. 4 (2) before 1936 when sub-Ss. 3, 4 and 5 were enacted. But they can be punished for continuing to be such members.

Though there may be no legal bar to a Magistrate's taking cognizance of such an offence on a private complaint it is not expedient that any "Tom, Dick or Harry" should be permitted to harass members of companies out of motives of private spite or enmity.

V. T. Rangaswami Aiyangar and *S. Amudachari* for Accused.

T. V. Ramanatha Aiyar for Complainant.

A. S. Sivakaminathan and *K. Venkataraghavachari* for the Public Prosecutor for the Crown.

K.S.

King and Happell, JJ.
18th September, 1941.

Venkatarathnam Chetti *v.* Venkatayya.
A.A.O. No. 340 of 1939.

Provincial Insolvency Act (V of 1920), S. 16—Petition by one creditor alleging the execution of a mortgage by the debtor within three months—Petitioner not proceeding with due diligence—Another creditor allowed to continue the proceedings long after three months from date of mortgage—Date of presentation of the petition by the first creditor whether available to base adjudication of debtor an insolvent.

A petition for adjudication of a debtor as insolvent was originally filed by one of the creditors on 25—8—1934 and it stated that the act of insolvency was the execution of a mortgage deed by the debtor on 17—8—1934. In 1937 the second petitioner, another creditor was allowed to continue the insolvency under the provisions of S. 16 of the Provincial Insolvency Act, as the Court was satisfied that the original petitioner was not proceeding with due diligence. There was no contest on the question of the nature of the mortgage executed by the insolvent and an order of adjudication accordingly followed. On appeal,

Held, that the order of adjudication was proper and that the mere accident of the fact that the creditor who has filed the petition should turn out not to have been qualified to do so will not prevent the creditor subsequently allowed to continue the proceedings under S. 16 of the Provincial Insolvency Act from taking advantage of the date of the presentation of the petition originally by the other creditor.

(1895) 1 Q.B. 194 distinguished.

I.L.R. 51 Mad. 594 relied on.

A. Bhujanga Rao and *D. R. Krishna Rao* for Appellant.

G. V. Ramalingam, R. S. Swaminathan and *S. Ranganatha Aiyar* for Respondent.

K.S.

Horwill, J.
19th September, 1941.

Ponnuswami Reddiar *v.* Sadasiva Reddiar.
Case Referred No. 40 of 1941.
(Cr.R. Case No. 676 of 1941.)

Criminal Procedure Code (V of 1898), S. 195 (b)—Sub-Magistrate making complaint under S. 195 (b), Cr.P.Code—No power to revise his order.

A Magistrate wrote an order thus: "I therefore consider that it is essential in the interests of justice that I should take action in this case under S. 195 (*b*), Cr.P.Code and I therefore make the complaint against the respondent." Instead of making a complaint in the ordinary form he thought it more deferential to the First Class Magistrate to whom he should have preferred the complaint, to submit the records for favour of orders.

Horwill, J.
24th September, 1941.

Narayanan Nambiar Petitioner.
Cr.R.C. No. 739 of 1941.
(Cr.R.P. No. 694 of 1941).

Criminal Procedure Code Act (*V of* 1898), *S.* 540—*Scope—Court's discretion to examine witnesses.*

The wording of S. 540, Criminal Procedure Code is extremely wide and enables a Magistrate at any stage of any proceeding to examine any person as a witness; and where it is essential for the just decision of the case, he is bound to do so. S. 540 is not limited only for the benefit of the accused and it will not be an improper exercise of the powers of the Court to summon a witness under that section merely because the evidence supports the case of the prosecution and not that of the accused.

V. V. Srinivasa Aiyangar and *M. C. Sridharan* for Petitioner.

Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Venkataramana Rao and Somayya, JJ.
26th September, 1941.

Valangaputi Pandiyan *v.* Rev. Father Pignol.
Appeal No. 32 of 1938.

Limitation—Sale of trust property as trustee's own property— Ab initio *void and adverse possession of alienee starts from date of alienation.*

A sale of trust property treating it as trustee's own property is *ab initio* void and possession of the alienee is adverse to the trust from the date of the alienation.

A.I.R. 1938 Mad. 60 and (1938) 1 M.L.J. 113, followed.

C. Narasimhachari and *M. E. Rajagopalachariar* for Appellant.

K. V. Krishnaswami Aiyar, T. L. Venkatarama Aiyar, P. N. Appuswami Aiyar and *S. V. Gopalakrishna Aiyar* for Respondent.

K.S.

[F.B.]
The Chief Justice, Krishnaswami Aiyangar and Happell, JJ.
3rd October, 1941.

The Cannanore Bank, Ltd. *v.* Madhavi.
Appeal No. 112 of 1938.

Civil Procedure Code (*V of* 1908), *O.* 21, *r.* 63—*Claim petition objecting to attachment 'not pressed and dismissed'—Subsequent suit for declaration—Limitation.*

Where a claim petition objecting to an attachment is dismissed as not pressed, the order is one against the claimant even though there has been no investigation of the claim. It is necessary for such claimant to file a suit within one year as provided under O. 21, r. 63.

M. C. Sridharan for Appellant.

K. Kuttikrishna Menon and *D. A. Krishna Wariar* for Respondent.

K.S.

Venkataramana Rao, J.
3rd October, 1941.

Saradambal *v.* S. Subbarama Aiyar.
C.M.S.A. No. 195 of 1940.
and C.R.P. No. 1273 of 1940.

Hindu Women's Right to Property Act (*XVIII of* 1937)—*Widow's interest in husband's joint family property—Right of husband's creditors to proceed against.*

The widow under the Hindu Women's Rights to Property Act gets the same interest which her husband had in the joint family property and as his interest could be attached in execution for his debt in his life time, a creditor is entitled to the same remedy against the interest of the widow accrued under the Act in respect of non-agricultural land.

V. Subramaniam for Appellant.

V. C. Veeraraghavan for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
7th October, 1941.

Mantri Erram Reddi and another *v.* Karnam Soorappa.
C.R.P. No. 857 of 1940.

Madras Agriculturists' Relief Act (IV of. 1938), *S.* 19—*Preliminary decree on mortgage passed before and final decree after the coming into force of Act IV of* 1938—*Subsequent scaling down—Permissibility.*

A preliminary decree on a mortgage had been passed before the coming into force of Act IV of 1938 and the final decree was passed after the Act came into force without any application for scaling down. The debtor applied subsequently for scaling down the decree under S. 19 of the Act.

Held, in revision, that in as much as the Act provided a special procedure under S. 19 for scaling down decrees passed before the Act came into force, the mere existence of a parallel remedy by way of a right to oppose the passing of the final decree without scaling down, is no bar to the special remedy under S. 19. The final decree was not a decree for the repayment of a debt within the meaning of S. 19.

M. S. Ramachandra Rao, A. Bhujanga Rao and *D.R. Krishna Rao* for Petitioner.

S. V. Venugopalachari for the Respondent.

K.S.

The Chief Justice and Happell, J.
8th October, 1941.

S. S. Pattabhirama Aiyar.
Cr. Rev. Case No. 391 of 1941.

The Madras General Sales Tax Act (Turnover and Assessment Rules) 1939—*Amendment to r.* 11 *issued in Fort St. George Gazette dated 3rd December*, 1940 *declaring amendment to have come into force from* 1*st April,* 1940—*How far retrospective.*

Amendment to r. 11 in the course of a prosecution for an offence under S. 15 (*a*) of the Act for non-submission of a return, when, as the rules stood on the date of the prosecution, viz., 30—8—1940, no return was due even though the turnover was over Rs. 10,000 cannot create an offence retrospectively and a conviction for the offence cannot stand.

The validity or otherwise of the amendment in other respects not questioned.

S. S. Ramachandra Aiyar for Petitioner.

The Advocate-General (*Sir Alladi Krishnaswami Aiyar*) and *A.S. Sivakaminathan* for the Government.

K.S.

Wadsworth, J.
12th September, 1941.

Ramanuja Aiyangar *v.* Govindarajulu Naidu.
C.R.P. No. 1627 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (iv) and s. 15—"Rent"—If includes amount payable by the lessee of the right to collect jodi—If deposit under S. 15 can cancel the arrears for earlier faslis.

The proprietor of an estate leased out the right to collect the jodi and the contract provided that the lessee was to pay an annual sum of Rs. 200 in return for the assignment.

Held, that this annual payment of Rs. 200 is an ordinary contractual rent paid by the lessee not as jodi, but as consideration for the leasing of the right to collect jodi from a third person. Even if the right is sold to the person or one of the persons who himself has to pay such jodi, the nature of the payment to the proprietor will not be changed. Accordingly this amount payable annually is not "rent" under Act IV of 1938 and arrears for earlier faslis cannot be cancelled by deposit under S. 15 of the Act.

S. T. Srinivasagopalachari for Petitioner.

C. S. Venkatachariar and *D. Ramaswami Ayyangar* for Respondent.

K.S.

Burn, J.
18th September, 1941.

Muthuvelu Udayan *v.* Thangavelu Udayan.
A.A.O. No. 556 of 1939.

Practice—Suit by ward for possession without prayer for setting aside alienations made by his de jure guardian—Maintainability.

A plaintiff suing for possession without setting aside alienations made by his *de jure* guardian, cannot be compelled to add to his plaint prayers which he does not want to add and his suit could not properly be dismissed for refusal to add those prayers. Whether the plaintiff can succeed without setting aside the alienations made by his *de jure* guardian is a totally different question. That is a question appertaining to the relief which he may or may not obtain; it does not appertain to the maintainability of the suit.

N. Suryanarayana for Appellant.

R. Rangachariar for Respondent.

K.S.

Somayya, J.
19th September, 1941.

Narasinga Rao *v.* Obuli Chettiar.
S.A. No. 578 of 1940.

Provincial Insolvency Act (V of 1920), S. 4—Orders under—How far conclusive.

The conclusive effect given by S. 4 (2) to orders passed by the Insolvency Court on matters which it decides under S. 4 (1) of the Provincial Insolvency Act is only between the debtor and the debtor's estate on the one hand and the claimants against him or it and all persons claiming through or under them or any of them. The expression "all persons claiming through or under them" does not include a person who claims under a transaction which had taken place prior to the commencement of those proceedings.

A.I.R. 1937 Ran. 369, not followed.

B. V. Viswanatha Aiyar for Appellant.

T. M. Krishnaswami Aiyar and *N. Sivaramakrishna Aiyar* for Respondent.

K.S.

N R C

Wadsworth and
Patanjali Sastri, JJ.
22nd September, 1941.

Ranganayakulu *v.*
Gopayamma.
C.R.P. No. 1670 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 23—Scope.

In June 1934 a decree-holder attached in execution under O. 21, r. 66, C.P. Code, a mortgage debt due to the judgment-debtor. On the 9th October, 1935 while the attachment was still pending the judgment-debtor transferred her mortgage right to her daughter. In November, 1937 the mortgage right was sold by the Court in execution and was purchased by a stranger. On 7th January, 1938, full satisfaction of the decree was recorded. On 15th June, 1938, the judgment-debtor and her transferee both joined in an application under S. 23 of Act IV of 1938 to set aside the sale of the mortgage right. The judgment-debtor was a non-agriculturist and her transferee an agriculturist. Assuming without deciding that the sale of a mortgage right (though carried out under the procedure prescribed in O. 21 for the sale of debts and other movable properties) is for the purposes of S. 23 of Act IV of 1938 a sale of immovable property.

Held, (*i*) the actual judgment-debtor, not being shown to be an agriculturist she cannot apply under S. 23;

(*ii*) the transfer being in disregard of the attachment, is void as against claims enforceable under the attachment and the transferee can be ignored by the decree-holder and the execution can be proceeded with treating the transferor as still being the owner of the properties. There is therefore no property liability on the part of the transferee to entitle him to apply for scaling down. I.L.R (1939) Mad. 218 and (1940) 2 M.L.J. 887, distinguished;

(*iii*) under S. 23 an agriculturist is not entitled to get a court-sale set aside when a decree has been satisfied before the coming into force of the Act, and no debt subsists on 22—3—1938. (1941) 1 M.L.J. 106 and (1940) 2 M.L.J. 417, approved.

V. Govindarajachari for Petitioner.
B. Jagannadha Das for Respondent.

K.S.

Wadsworth and
Patanjali Sastri, JJ.
25th September, 1941.

Muthyalu *v.* Chinnayya.
C.R.P. No. 2318 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Surety under S. 145, Civil Procedure Code—If entitled to apply under S. 19 for scaling down his liability—Extent of right.

A person gave a surety bond undertaking to satisfy any decree which might ultimately be passed against the judgment-debtors under an *ex parte* decree which was set aside on such undertaking. The decree itself was in respect of promissory notes in renewal of earlier ones. When the liability under the ultimate decree was sought to be enforced against the surety,

Held—Since the surety is for the purposes of execution in the position of a judgment-debtor there is no reason why he should not be given the benefit of the procedure laid down in S. 19 of Act IV of 1938 for agriculturist judgment-debtors. The liability of the surety must be taken to have arisen in 1934 when the bond and the decree came into existence and the surety is entitled to the benefits only under S. 9. The surety however is not entitled to go behind the decree and have his liability reduced with reference to the original promissory notes by the judgment-debtors.

Decision in C.R.P. No. 1965 of 1939 **explained away.**

T. R. Arunachalam for Petitioner.
K. S. Jayaram for Respondent.

K.S.

Venkataramana Rao, J.
26th September, 1941.

Thangathammal *v.* Veeranna Reddiar.
A.A.A.O. No. 157 of 1939.

Civil Procedure Code (V of 1908), S. 73—Rateable distribution—Decree-holder succeeding as heir and legal representative of judgment-debtor—How far entitled to share in rateable distribution of assets realised in execution proceedings against such representative.

A decree was obtained by *T* against her brother *R* who died subsequently leaving *T* as his heir and representative. Another creditor of *R* obtained a decree against *T* as the heir and representative of *R* and before assets were realised in execution by that creditor *T* applied for rateable distribution in respect of the amount due under the decree in her favour for which she had obtained an attachment before judgment which was subsisting on the date of the sale in execution by the other creditor and she had also applied for execution.

Held, that (*i*) if *R* had left assets other than the property which was sold, sufficient to satisfy *T's* decree her claim must be allowed. But if the only asset left was the property which was sold, so much of the property that would be necessary to satisfy her debt must be deemed to have been appropriated for her debt and only the balance will be available for payment to the respondent.

Though *T* may not be entitled to apply under S. 73 as the decree must be deemed to have been satisfied and therefore execution cannot issue, still she is entitled to urge her claim under S. 47, C.P.Code, and prevent the other creditor from appropriating the whole of the sale proceeds for satisfaction of his debt. The fact that she has chosen to claim rateable distribution should not stand in the way of her, getting the limited relief which she has claimed.

T. V. Ramanatha Aiyar and *T. S. Venkatarama Aiyar* for Appellant.

K. V. Sesha Aiyangar for Respondent.

K.S.

Horwill, J.
1st October, 1941.

Murugayya Pillai *v.* Rajagopala Pillai.
C.R.P. No. 2557 of 1939.

Stamp Act (II of 1899), S. 32—Certificate by Collector—Finality—Collectors opinion not endorsed on the document but expressed in a letter to that effect—How far binding on Civil Courts.

The petitioner after obtaining an assignment of a promissory note took the assignment to the Collector for his opinion under S. 32 of the Stamp Act. The Collector expressed his opinion that no stamp duty was necessary and sent the petitioner a letter to that effect. In a suit on the promissory note the District Munsif found that the opinion was wrong and also that the Collector had no jurisdiction to entertain the application under S. 32 because it was sent to him more than a month after the execution of the assignment. He also found that the certificate was of no avail as it was not endorsed on the instrument itself. On revision,

Held; (*i*) the Collector's decision would be final even if he erred in his opinion that no stamp was necessary;

(*ii*) but the letter is not the certificate referred to in S. 32 (2) and therefore it is not binding on the Civil Court;

(*iii*) the fact that the Collector could not rightly have given an endorsement after such a lapse of time justified the Court in not returning the document for such endorsement, especially as the petitioner persisted that the endorsement in the form of a letter was in order.

K. S. Desikan for Petitioner.

R. Sundaralingam, K. R. Subramania Aiyar and *R. Balaram* for Respondents.

K.S.

Horwill, J.
2nd October, 1941.

Lakshmi Sundaramma and others *v.* Suryanarayana.
Cr.R.C. No. 732 of 1941.
(Cr.R.P. No. 687 of 1941).

Criminal Procedure Code (V of 1898), S. 488—Rate of maintenance by Criminal Court reduced pursuant to declaration in civil suit as to proper rates—Subsequent application for enhancement of rate—Forum.

The petitioner applied for and obtained in the Criminal Court an order against her husband for maintenance for herself and her three children. The husband took the matter to the Civil Court and got a declaration in 1938 that the rates awarded by the magistrate were excessive and that the proper rates would be Rs. 12 for the wife and Rs. 4 for each of her three children. The matter was taken on appeal which was dismissed in 1939. On the husband's application the magistrate then reduced the rates in 1939 in accordance with the findings of the Civil Court. Subsequently in 1940 the wife applied to the Criminal Court for enhancement of the rates on the ground that the children were then older and cost more to maintain.

Held, that (1) as the decree of the Civil Court was not executable the petitioner was entitled to go to the Criminal Court and ask for enhancement and she was not bound to go to the Civil Court.

(2) The rate of maintenance must be taken to have been fixed by the trial Court decree in the civil suit on the circumstances as they existed at the time when evidence was taken and not as on the date of the appellate Court's decree which merely affirmed that of the first Court because the rates were proper on the date of the first Court's decree.

(3) Accordingly the petitioner is entitled to an increase in the rate of maintenance of the children on the basis of increased cost of maintaining them.

D. V. Reddi Pantulu for *N. Subramanyam* for Petitioners.

K. Bhimasankaram for Respondent.

K.S.

Burn, J.
2nd October, 1941.

Sreedevi *v.* Neelakantan Bhattadripad.
A.A.A.O. No. 237 of 1939.

Civil Procedure Code (V of 1908), S. 47 and O. 21, rr. 90 and 92—Questions under S. 47 abandoned—Order if open to second appeal.

Where though several important questions under S. 47, Civil Procedure Code were raised but abandoned that will not give a right of second appeal, for the determination of a question arising only under O. 21, r. 90 of the Code.

K. P. Ramakrishna Aiyar for Appellant.

D. H. Nambudiripad for Respondent.

K.S.

Horwill, J.
3rd October, 1941.

Venkatarama Ayyar *v.* Sankara Ayyar and others
Cr.R.C. 752 of 1941.

Criminal Procedure Code (V of 1898), S. 408—Fine of Rs. 33 each on each of three counts—Appealability.

The petitioner was charged under S. 500, I.P.Code on three counts of sending a defamatory letter to three persons. He was found guilty and sentenced to a fine of Rs. 33 on each of the three counts.

Held, that because the aggregate fine exceeded Rs. 50 the petitioner has his ordinary right of appeal under S. 408, though if the cases had been separately tried there would have been no right of appeal.

R. Srinivasachariar and *K. V. Rajagopalan* for Petitioner.

S. V. Rama Ayyangar for Respondents.

K.S.

Horwill, J.
3rd October, 1941.

Syed Murthusa Sahib, accused.
Cr.R.C. No. 807 of 1941.
(Cr.R.P. No. 307 of 1941).

Madras Local Boards Act (XIV of 1920), *S.* 160 (3)—*Lease of site—Notice to quit after expiry of period of lease purporting to be one under S.* 159 (1) *instead of under S.* 164 (2)—*Lessee ignoring the notice—Offence.*

The petitioner was granted a lease under S. 160 (3) of the Local Boards Act for a period of one year to use a road side site on which he constructed a small shed. He did not quit the land at the end of the period of the lease and so a notice was sent to him purporting to be one under S. 159 (1) requiring him to remove the shed within a fortnight and threatening in default proceedings under the Act. He ignored the notice and the prosecution was instituted for an offence punishable under S. 159 (1) read with S. 207 (1) (*a*) and (*c*) of the Local Boards Act.

Held, that though the notice did not purport to be a notice under S. 164 (2) but one under S. 159 (1), the notice had made very clear what was required of the petitioner and he was accordingly guilty of the offence of disregarding a lawful notice of the President.

M. S. Venkatarama Aiyar for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Horwill, J.
7th October, 1941.

Thimmakka and another *In re.*
Cr. R.C. No. 354 of 1941.

Penal Code (XLV of 1860), *S.* 186—*Sales Officer of co-operative society—Whether "public officer".*

The sales officer of a co-operative society is a public servant and the wife of a person voluntarily obstructing him from attaching the movables of the debtor in execution of a decree obtained against him by a co-operative society is liable to conviction for an offence under S. 186 of the Penal Code.

J. R. Gundappa Rao for Petitioners.

The Public Prosecutor for the Crown.

K.S.

The Chief Justice and Happell, J.
8th October, 1941.

Sri Rajah Kavali Alimelumangathayaramma *v.* Palanki Basivi Reddi.

C.R.Ps. Nos. 412 to 414 of 1939.

Madras Estates Land Act (I of 1908)—*"Water cess"—Suit for recovery—Forum.*

The plaintiff's predecessors in title sold a village to a person and undertook at the time of the sale to supply the ryots of that village water from a tank situated in another village belonging to the plaintiff. In suits filed by the plaintiff in the Civil Court for recovery of water-cess from the ryots,

Held, that the charge for water supplied was "rent" within the meaning of the Estates Land Act and the suits should have been filed only in the Revenue Courts, though the relationship of landholder and ryot did not exist between the plaintiff and the ryots in regard to the holdings.

M. Srinivasa Rao for *Kasturi Seshagiri Rao* for Petitioner.

B. V. Ramanarasu for Respondent.

K.S.

Wadsworth, J.
9th October, 1941.

Raja Shanmuga Rajeswara Sethupathi
v. Samalam Ayyar.
C.R.P. No. 283 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), S. 15—Mortgagee from tenant paying rent for tenant—Right of tenant to relief under S. 15 of the Act.

Where the payment of rent was apparently made by the mortgagee for the tenant, the tenant is entitled to apply for the relief to which he is entitled under S. 15 of Act IV of 1938 as a result of the payment of the rent for the relevant faslis. The decision in C.R.P. No. 1730 of 1939 has no bearing for in that case the mortgagee himself applied for the relief.

K. Kuttikrishna Menon for Petitioner.

Respondent not represented.

K.S.

Venkataramana Rao, J.
10th *October*, 1941.

Bava Oushadhiswaraswami Devasthanam
v. Samiappa Mudaliar.
S.A. No. 156 of 1939.

Trusts Act (II of 1882), S. 88—Scope.

A trustee is not debarred from purchasing property which had originally belonged to the trust and had gone into the hands of third persons who had acquired a title to the same by adverse possession.

B. Sitarama Rao and *G. R. Jagadisan* for Appellant.

K. Bhashyam Aiyangar, R. Sundaralingam and *T. R. Srinivasan* for Respondent.

K.S.

Horwill, J.
10*th October*, 1941.

Kola Saheb, accused.
Cr. App. No. 396 of 1941.

Criminal complaint—Limitation—No bar of, to filing criminal complaint for preferring false complaint.

There is no period of limitation laid down for filing a complaint for preferring a false complaint.

A. S. Sivakaminathan for Appellant.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K.S.

The Chief Justice and Happell, J.
10*th October*, 1941.

Kailasa Ayyar *v.*
Sundaram Pattar and others.
C.R.P. No. 1271 of 1939.

Mortgage—Suit by person entitled only to a share in the mortgage-money—Valuation for court-fees and jurisdiction.

A mortgage is a single and indivisible cause of action and therefore a person seeking to enforce the mortgage for recovery of his share of the mortgage-money must ask for recovery of the full amount due under the mortgage which must therefore be taken to be the value for purposes of court-fee and jurisdiction.

Observations of *Varadachariar, J.*, in (1937) 2 M.L.J. 666, approved.

N. R. Sesha Aiyar for Petitioner.

K. Subba Rao for Respondent.

K.S.

Horwill, J.
22nd September, 1941.

Narasimhulu Chetti *v.* China Ramayya Naidu.
C.R.P. No. 2429 of 1939.

Practice—Court-fee and suit valuation—Court-Fees Act (VII of 1870), S. 12 (1)—Fixing of court-fee—Finality—If bar to subsequent finding as to value of property for purposes of jurisdiction.

A finding as to the value of the property for purposes of court-fee does not preclude the Court from afterwards coming to the conclusion that it had no jurisdiction to try the suit. The true value of the land determines jurisdiction and is also the basis for calculating court-fee, subject to the qualification of s. 12 (1) of the Court-Fees Act that when once the amount of court-fee has been determined it is final.

K. Umamaheswaran for Petitioner.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Respondent.

K.S.

Wadsworth, J.
8th October, 1941.

Kamaraju *v.* Seshagiri Rao (Receiver).
C.R.P. No. 263 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Preliminary decree in partnership suit—If can be scaled down.

There is nothing in a preliminary decree in a partnership suit which can properly be scaled down under S. 19 of Act IV of 1938, the preliminary decree not being one for the payment of a debt. If, after the commencement of Act IV of 1938, one of the parties to a partnership action, wishes to urge a defence under the Act in reduction of his liability to be declared in the final decree, the proper procedure for urging that defence is by means of a written statement filed in the final decree proceedings and not by an application to scale down the preliminary decree. If the final decree is passed after the commencement of the Act it cannot be amended under S. 19.

C. Rama Rao for Petitioner.

B. V. Ramanarasu for Respondent.

K.S.

King and Lakshmana Rao, JJ.
8th October, 1941.

Budi Geddannaidu and another *v.* Chintalapudy China Ramanna.
C.M.A. No. 70 of 1940.

Madras Debt Conciliation Act (XI of 1936), S. 25—Scope—Power of Court to demand security while granting stay under.

S. 25 of the Debt Conciliation Act has no prohibitive effect upon the power of the Court to make provision for continuing the execution proceedings in case necessity should arise in future, for instance by an order under C.P.Code, O. 21, r. 40 (2). Accordingly the Court while granting stay by releasing a debtor from arrest has the power to call upon him to furnish security.

V. Suryanarayana for Appellant.

V. Govindarajachari for Respondent.

K.S.

N R C

Burn, J.
9th October, 1941.

Lakshmanaswami *v.* Narayanamurti.
S.A. No. 811 of 1939.

Transfer of Property Act (IV of 1882), S. 6(a)—Vendor with mere chance of obtaining legacy of certain house sites—Sale purporting to be owner—Validity of transfer.

It is not permissible to evade the prohibition of S. 6 (*a*) of the Transfer of Property Act by purporting to transfer the immovable property itself when the transferor has no title to it, but only a chance of getting it by way of legacy at some future date. Accordingly where a mortgagor merely expected to get a legacy from his sister of some house sites which he purported to mortgage as belonging to himself and the mortgagee knew that it did not belong to him, the mortgage is void as offending S. 6 (*a*) of the Transfer of Property Act.

V. Viyyanna for Appellants.

K. Venkatarama Raju and *P. Satyanarayana Rao* for Respondents.

K.S.

Burn, J.
9th October, 1941.

Muni Reddi *v.* Kondiah.
S.A. No. 833 of 1939.

Civil Procedure Code (V of 1908), S. 73—Decree against legal representative of debtor and decree against debtor in his life time—Rateable distribution.

A decree passed against the legal representative of a deceased debtor can, for purposes of S. 73, be said to be against the same judgment-debtor as a decree passed during the lifetime of the debtor against the debtor himself.

The decision in *Ramakrishna Chettiar* v. *Visvanathan Chettiar*, I.L.R. 59 Mad. 93 (F.B.), does not proceed upon any peculiar incidents attaching to a Hindu family and is in quite general terms.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

K. Kuppuswami for Respondents.

K.S.

Venkataramana Rao, J.
10th October, 1941.

Stanumurthiayya *v.* Ramappa and others.
S.A. No 784 of 1939.

Hindu law — Inheritance — Murderer disqualified from inheriting victim's estate—Issue of murderer—Rights.

One *N* the last male owner died leaving him surviving his widow and a daughter. The widow was murdered by her daughter and son-in-law. *N's* deceased divided brother's sons sued to recover the estate from the daughter's sons,

Held, that the daughter's children are entitled to inherit to their grandfather's estate in spite of the fact that their mother murdered their grandmother. Though they are related to the murderess they do not trace title through her. 48 Bom. 569 (P.C.), relied on.

K. Y. Adiga and *S. Ramayya Naick* for Appellant.

K. Srinivasa Rao for Respondent.

K.S.

Horwill, J.
13th October, 1941.

Syed Dewan Khaja Mohideen Saib
v. D. M. Abdul Guffar Saib.
C.R.P. No. 1699 of 1940.

Suit valuation—Suit for administration—Valuation for jurisdiction.

An administration suit is not a mere suit for accounts and court-fee is therefore payable under S. 17 (*b*) of Sch. II of the Act and the market value of the properties and not the notional value would be the value for the purpose of jurisdiction.

K. V. Ramaseshan and *C. D. Venkataraman* for Petitioner.

K. V. Ramachandra Aiyar for Respondent.

The Government Pleader (*K. Kuttikrishna Menon*) for the Government.

K.S.

Wadsworth and
Patanjali Sastri, JJ.
14th October, 1941.

Rangaswami Pillai and others
v. Vasuammal.
C.R.P. No. 320 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *S*. 4 (h)*—Proof that woman decree-holder is entitled to other mortgage debt which will deprive her of the exemption under S*. 4 (*h*)*—Evidence that she was merely benamidar in respect of the mortgage debt—Admissibility.*

When the judgment-debtors filed an application under S. 23 of Act IV of 1938 the decree-holder being a woman pleaded that she came within the exemption of S. 4 (*h*) of the Act. As against this it was urged that she was entitled to a mortgage debt evidenced by a bond for Rs. 4,500 in her favour. She met this contention by adducing evidence that she was not the owner of the mortgage bond but a benamidar for her adopted son.

Held, that the question being purely one of ownership of the proceeds of the mortgage debt to which the ordinary law applies, there is no reason why it should not be open to the lady in question to adduce evidence that, though the mortgage stood in her name, her son was really entitled to the proceeds thereof and that she was not beneficially interested therein. 58 Mad. 693 (F.B.), referred; (1940) 2 M.L.J. 664 and (1941) 1 M.L.J. 313, distinguished.

K. G. Srinivasa Aiyar for Petitioner.

K. S. Desikan for Respondent.

K.S.

Horwill, J.
15th October, 1941.

D. K. Reddy, *In re*.
Cr.R.C. No. 741 of 1941.
(Cr.R.P. No. 696 of 1941).

Criminal Procedure Code (*V of* 1898), *S*. 407 (2) *and S*. 486 (2)*—Appeal under S*. 486 (1) *against sentence under S*. 480*—District Magistrate if can direct the appeal to be heard by Subordinate Magistrate.*

An appeal lies against a sentence imposed under S. 480 of the Criminal Procedure Code only under S. 486 (1) and not under S. 407. Where an appeal has thus been filed to the District Magistrate the appeal cannot as in the case of appeals under S. 407 (1) be directed to be heard by any Magistrate of the first class subordinate to him. S. 407 (2) could not be applied to an appeal under S. 486 (1).

K. S. Jayarama Aiyar and *C. K. Venkata Narasimhan* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

The Chief Justice and
Happell, J.
15th October, 1941.

Ponnuswami *v.* Muthuswami Goundar and another.
C.R.P. No. 916 of 1940.

Partnership Act (IX of 1932), S. 69 (2)—Registration of firm subsequent to filing of suit—If can cure the defect and make suit maintainable.

The language of S. 69 of the Partnership Act is mandatory. If a firm which is suing was not registered at the time of the institution of the suit, the Court has no option but to dismiss it and registration subsequent to the institution of the suit is of no avail to such a plaintiff.

(1937) 2 M.L.J. 273, overruled. (1938) 2 M.L.J. 44 at 58 and I.L.R. 18 Pat. 114, followed.

S. V. Venkatasubramaniam for Petitioner.

K. S. Ramamurti and *A. N. Veeraraghavan* for Respondent.

K.S.

Horwill, J.
15th October, 1941.

Public Prosecutor *v.* Krishnaswami.
Crl. App. No. 415 of 1941.

Motor Vehicles Act (IV of 1939), Ss. 3 and 112—Expiry of driving licence and renewal after ten days as from date of expiry—Driving without licence in the interval—Offence.

The accused's driving licence had expired on 10th December, 1940 and on 12th December an accident occurred in which the accused while driving a motor car ran over and killed a child. He at once applied for a renewal of his licence which was granted. He was subsequently prosecuted for driving without a licence and it was contended that the subsequent renewal dated back to the 10th December and that therefore the accused must be deemed to have had an effective licence on the 12th December, 1940.

Held, that the renewal cannot be regarded as a licence to infringe at pleasure another provision of the Act or as a grant of pardon by the licensing authority to one who has broken the law. Accordingly the accused having contravened the provisions of S. 3 of Act IV of 1939 committed an offence punishable under S. 112 of the Act.

The Public Prosecutor (*V. L. Ethiraj*) in person.

K. V. Sesha Aiyangar and *N. S. Mani* for Respondent.

K.S.

The Chief Justice
and Happell, J.
24th October, 1941.

Chockalinga Mudali *v.* Manicka Mudaliar *alias* Singara Mudali.
S.A. No. 1119 of 1938.

Provincial Insolvency Act (V of 1920), S. 44 (2)—Mortgagee's right to personal decree under O. 34, r. 6 of C. P. Code (V of 1908)—Whether lost by order of absolute discharge in mortgagor's insolvency.

A mortgagee obtained a preliminary decree on his hypotheca on January 8, 1917 and a final decree thereon on January 29, 1920. The mortgagor who was adjudicated an insolvent in November, 1917, obtained an order of absolute discharge in February, 1926. The sale of the hypotheca took place a year after the discharge and there was a deficiency for which the mortgagee applied for a personal decree under C. P. Code, O. 34, r. 6.

Held, that the personal liability of the mortgagor was not a debt provable in insolvency as the mortgagor neither relinquished nor valued nor released his security during the pendency of the insolvency proceedings. S. 44 (2) of the Provincial Insolvency Act has no application where the contingent right to the deficiency had not arisen before the order of discharge. Accordingly a personal decree for the deficiency can be passed as that liability is not extinguished by the order of discharge.

I.L.R. (1940) Nag. 512 and (1941) 2 M.L.J. 690, dissented from.

V. Rajagopalachari and *K. Rajah* for Appellant.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. Sundaram *v.* Subba Rao.
6th October, 1941. **C.R.P. No. 165 of 1940.**

Madras Agriculturists' Relief Act (IV of 1938), *S.* 6—*Scope and applicability—Hindu father assessed to income-tax—Undivided sons if excluded from benefits of Act IV of* 1938.

A suit was based on a promissory note of 1933 made by the first defendant in favour of the plaintiff, defendants 2 to 5 being impleaded as the undivided sons of the first defendant. The suit debt related back to prior transactions starting in 1922. The plaintiff produced a copy of an income-tax assessment order which showed that the first defendant along with certain partners was assessed to income-tax for the financial year 1936-37 and on this ground it was held by the trial Court that neither the first defendant nor his sons could claim the benefit of Act IV of 1938. On revision,

Held, that where as in the instant case the family consists only of the father and sons, S. 6 of Act IV of 1938, has no application. The scope of S. 6 is confined to a case in which there is a major family unit which even after the application of the section still remains an agriculturist family; and in such circumstances the scope of the section would be to exclude from the benefits of the Act any member of such an agriculturist family who was a non-agriculturist and his descendants in the male line.

(1940) 2 M.L.J. 817, considered.

In the circumstances, the father is excluded from the benefits of the Act; and as regards his sons, if the assessment to income-tax was made on the father in his individual capacity only, the sons would be entitled to relief under the Act. If the assessment had been made as manager of the joint family of himself and his sons, the sons also will be excluded from the benefit of the Act.

G. Chandrasekhara Sastri for Petitioner.
S. Venugopala Rao for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. Narayana Bhat *v.* Rama and others.
7th October, 1941. **App. No. 309 of 1939.**

Madras Agriculturists' Relief Act (IV of 1938), *S.* 8 (1)—*"Interest outstanding on* 1—10—1937"—*Meaning.*

In a suit on a mortgage under which interest was payable on the 10th March of each year, it was contended that the interest from 10th March, 1937 up to the 1st October, 1937 was wiped out as "interest outstanding on 1—10—1937". The mortgagee contended that the interest was not outstanding as it was payable only on the 10th March every year.

Held, that although a date was fixed for the payment of interest, interest must be deemed to have accrued due from day to day according to the ordinary rule. The word "outstanding" used in S. 8 (1) means "unpaid" and the interest up to 1—10—1937 had certainly accrued due and was outstanding though not payable until 10th March, 1938. Accordingly the interest for the period was liable to be cancelled under S. 8 (1) of Act IV of 1938.

K. Y. Adiga and *N. Shanker Bhat* for Appellant.
T. Krishna Rao for Respondent.

K.S.

Patanjali Sastri, J. Duraiswami Naidu *v.* Kailasa Naidu.
8th October, 1941. **S.A. No. 118 of 1940.**

Madras Agriculturists' Relief Act (IV of 1938), *S.* 18 (2)—*Scope and effect.*

N. R. C.

A plaintiff was compelled to file a suit after 1st October, 1937 and before Act IV of 1938 came into force as otherwise the suit would be time-barred. But for the plea under Act IV, the suit debt would be undischarged though by reason of the Act it was found ultimately that no amount was due to the plaintiff as more than twice the amount of the principal had been paid. In the circumstances,

Held, that there was no clear reason why the plaintiff should be deprived of his costs.

T. L. Venkatarama Aiyar for Appellant.

S. A. Seshadri Aiyangar for Respondent.

K.S.

Venkataramana Rao and Abdur Rahman, JJ.
9th October, 1941.

Kunhya Bai *v.* Velayuda Pillai.
App. No. 128 of 1939.

Hindu law—Mortgage by paternal grandmother on behalf of her deceased son's minor sons, acting as their guardian—Validity of—Reversioners joining in execution—Consent—Binding nature.

The paternal grandmother of a deceased son's minor sons, executed a mortgage purporting to act as their guardian while their mother was alive. Her adult sons joined in the execution of the mortgage.

On the question of the validity of the mortgage and of its binding nature as regards the reversioners,

Held, that the mortgage was invalid so far as the minors were concerned.

I.L.R. (1940) Mad. 358 (F.B.), followed.

Held further, that the reversioners were bound by their consent which raised a presumptive proof of 'necessity' for the mortgage.

6 L.W. 530 at 534, referred to.

K. R. Rangaswami Aiyangar and *C. R. Pattabhiraman* for Appellants.

K. Venkateswaran for Respondents.

K.C.

Patanjali Sastri, J.
10th October, 1941.

Berumull Sowcar *v.* Velu Gramany.
C.C.C.A. No. 51 of 1940.

Civil Procedure Code (V of 1908), *S.* 151—*Inherent powers—Application for certified copies of decree and judgment rejected as copy stamps were not deposited within time—Restoration of the petition—If can be ordered to enable computation of time for filing appeal—Civil Rules of Practice, Rule* 129—*If applicable.*

A Court has power to treat a petition for restoration of an application for copies (of decree and judgment) dismissed for default in depositing copy stamps within the time allowed, as a continuation of the original application. 18 Mad. 374, followed. Time for filing an appeal can be computed on the basis of the applications for copies originally filed.

K. P. Ramakrishna Aiyar and *C. R. Venkatachala Aiyar* for Appellant.

A. Nagarajan and *A. Visvanathan* for Respondent.

K.S.

Happell, J.
10th October, 1941.

Somasundara Mudaliar *v.* Arunachalam.
C.R.P. No. 1231 of 1941.

Transfer of Property Act (IV of 1882), *S.* 83—*Tender of amount under mortgage—If to include expenses incurred by mortgagee in bringing the mortgaged property to sale which had to be stopped by the deposit in Court under S.* 83.

A tender must be of the whole amount due on a mortgage and that amount will include the expenses of a sale or attempted sale of the mortgaged property which had to be stopped by reason of the deposit in Court of the mortgage amount under S. 83 of the Transfer of Property Act. It is not proper to direct the mortgagee to sue separately to recover the expenses of the attempted sale by him.

P. Mrithyunjaya Aiyar for Petitioner.

Respondent not represented.

K.S.

Mockett and Kunhiraman, JJ.
14*th October*, 1941.

Prasadha Rao *v.* Sivaramayya.
App. No. 110 of 1939.

Civil Procedure Code (V of 1908), S. 35—Costs—Right of successful party—Discretion of Court to disallow, to be exercised 'judicially'.

A Court cannot be said to be exercising its discretion judicially when it makes an order depriving the successful party of his costs for capricious reasons. Accordingly, where the assignee from a mortgagee successfully defended a suit against him by the minor sons of the mortgagor alleging that the mortgage was not supported by consideration and therefore not binding on them, it is not proper to deprive the assignee mortgagee of his costs on the ground that the transfer in his favour 'appeared to be speculative'.

K. S. Jayaram for *V. Subramaniam* for Appellant.

P. Satyanarayana Rao for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
15*th October*, 1941.

Venkataramayya *v.* Pundareekakshudu.
Appeal No. 131 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), S. 21—Scope—Annulment of adjudication of debtor as insolvent long before the Act—If S. 21 applicable.

On an insolvency petition filed on 6—7—1932 a debtor was adjudicated four months later. The insolvency was not prosecuted and on 1—11—1938 the adjudication was annulled and under S. 37 of the Provincial Insolvency Act the properties were directed to vest in the Official Receiver. In 1939 the debtor filed an application for review of the order and also prayed for the scaling down of a debt due to a creditor. The creditor had filed a suit with the leave of the Insolvency Court on 21—11—1939, wherein also the debtor pleaded that he was entitled to relief under Act IV of 1938. The right to scaling down was negatived by the trial Court on the ground that the debtor had no saleable interest in agricultural land on 1—10—1937 and that by reason of the annulment of the insolvency he was not entitled to call in aid S. 21 of Act IV of 1938 and the suit was decreed. On appeal,

Held, that the estate having vested in the Official Receiver the debtor was not an agriculturist either on 1—10—1937 or on the date of the commencement of the Act. He cannot get relief under the Act unless he comes under S. 21 for which it is necessary that the debtor should be an insolvent at the time of his application. The annulment of adjudication relegates the debtor to the position which he occupied before adjudication except in so far as the vesting order places the residue of the property at the disposition of the appointee for the benefit of the creditors.

K. Kameswara Rao and *T. Rajagopalan* for Appellant.

V. Govindarajachari for Respondent.

K.S.

Somayya, J. Sundaresa Iyer *v.* Ramaswami Iyer.
20th October, 1941. **C.R.P. No. 6 of 1940.**

Provincial Insolvency Act (V of 1920), S. 50 (2)—Scope—Official Receiver declining to apply for expunging an entry in the schedule of creditors—Application by a creditor—Maintainability.

Under S. 80 of the Provincial Insolvency Act the Official Receiver framed a schedule of creditors in which he included the names of the petitioners as creditors. No appeal having been filed under S. 80 (2) of the Act against that order, the act of the Receiver should be deemed to be the act of the Court and it is as though the Court itself framed the schedule of creditors under S. 33. Where the Court prepares a schedule of creditors under S. 33 the Receiver may apply for expunging a particular debt under S. 50 (1) and where the Receiver declines to interfere in the matter when moved to do so, the Court may expunge an entry on the application of a creditor.

T. L. Venkatarama Aiyar for Petitioner.

A. Swaminatha Aiyar and *S. Thiagaraja Aiyar* for Respondent.

K.S.

Burn and Happell, JJ. Appalaswami, *In re.*
23rd October, 1941. **R.T. No. 157 of 1941.**

Criminal Procedure Code (V of 1898), Ss. 164, 533 and 537—Confession by accused—Failure of recording Magistrate to append to the statement a memorandum as required by S. 164, Cr. P. Code—Whether the error renders statement inadmissible.

A confession was recorded by a Magistrate but he did not append to the statement a memorandum as required by the provisions of S. 164 of the Criminal Procedure Code to the effect that it had been explained to the deponent that he was not bound to make a confession and that if he did so it might be used as evidence against him. The Magistrate however gave evidence that he had in fact told the accused that he was not bound to make a confession and that any confessional statement that he might make could be used against him.

Held, that the failure to append the memorandum as required by S. 164 of the Criminal Procedure Code will not necessarily invalidate a statement made by an accused person.

Ss. 533 and 537 of the Code show that the statement is not rendered inadmissible by the error.

D. Narasaraju for the Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

King, J. Manickavasaga Thevar *v.* Chidambaram Pillai.
23rd October, 1941. **S.A. Nos. 643 to 649 of 1939.**

Madras Estates Land Act (I of 1908), S. 117—Provision whether obligatory or directory—Test of—Disregard of provisions as to sale—Effect of.

Where the Sales Officer whose duty it was to fix the date of the sale, settle the proclamation and cause the sale to be proclaimed, disregarded the provisions of the statute, and did not pass a single order, and the orders which the Sales Officer should have passed were passed by the Collector who had no authority,

Held, it was not a mere irregularity and the sale was a nullity.

(1940) 1 M.L.J. 20, followed.

N. S. Rangaswami Aiyangar for Appellants.

K. Venkateswaran for Respondent.

K.C.

The Chief Justice and Happell J.
24th October, 1941.

Nallamuthu Pillai *v.* Thirumalai Ayyangar.
L.P.A. No. 45 of 1940.

Easement—Customary right to irrigation from water standing on foreshore of tank—Interference by owner of servient land by putting bund to prevent submersion of his land—Right to restrain by injunction.

The patta lands in the foreshore of a tank were from time immemorial subject to submersion by the water or the tank when it was full. The owners of these lands attempted to raise bunds on their lands to prevent the submersion, causing material diminution of supply of water to the ryots of the ayacut of the tank.

Held, that the ryots of the ayacut have become entitled to have their lands irrigated with water standing on the said foreshore lands.

Any one who interferes with the customary supply is interfering with rights recognised by law and is therefore subject to the injunction of the Court.

Decision of Wadsworth, J. in S.A. No. 542 of 1937, affirmed; 36 L. W. 408, approved; 7 M.H.C.R. 37, distinguished.

K. V. Sesha Aiyangar and *J. S. Vedamanickam* for Appellants.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *K.R. Rama Aiyar* for Respondents.

The Government Pleader (*K. Kuttikrishna Menon*) for 5th Respondent.

K.S.

Patanjali Sastri, J.
24th October, 1941.

Ranganatham Chettiar *v.* Mariappa Mudali.
C.C.C.A. No. 22 of 1941.

Madras City Tenants' Protection Act (III of 1922)—Applicability to area included in the municipal limits after the Act came into force.

The expression "City of Madras," has not been defined in the City Tenants' Protection Act. S. 3 (5) of the General Clauses Act defines the term ''City of Madras'' to mean such local area as was so declared from time to time by the municipal authorities. Accordingly the Mambalam extensions included by a notification in 1934 in the city limits will be covered by the expression City of Madras and the City Tenants' Protection Act is applicable to that area and tenants in the area are entitled to the benefits of the Act.

N. Gopala Menon for Appellants.

S. Panchapagesa Sastri and *M. E. Rajagopalachari* for Respondents.

K.S.

King, J.
27th October, 1941.

Govindaraju Mudaliar *v.* Meenakshi Ammal and others.
S.A. No. 848 of 1939.

Trusts Act (II of 1882), S. 62—Trust for creditors—Purchaser of outstandings of creditor by trustee—Whether void or merely voidable.

One of the trustees under the deed of trust for creditors purchased the outstandings of the debtor in an auction and filed a suit as assignee to recover the dues. The suit was resisted on the ground that the purchase of the trust property by the trustee was void and conferred no title on him.

Held, that the purchase is merely voidable under S. 62 of the Trusts

Act at the instance of the beneficiaries and that subject to the terms and conditions contained in S. 62 of the Trusts Act, a creditor who has not assented to the trust deed cannot question the validity of the sale to the trustee.

K. Rajah Aiyar, K.S. Ramamurthi and *A. N. Veeraraghavan* for Appellant.

K. Bhashyam, T. E. Ramabadrachariar and *C. Natarajan* for Respondents.

K.S.

Venkataramana Rao and Abdur Rahman, JJ.
27th October, 1941.

Madura Municipal Council *v.* Madura, etc., Devasthanams.
Appeal Nos. 293 and 302 of 1939.

Madras District Municipalities Act (V. of 1920), S. 83—Shops within temple compound—How far exempt from property tax as "set apart for public worship".

Where there are shops or stalls within a temple and its adjuncts, not used only for purposes subservient to the worship in the temple, those shops are used for commercial as well as religious purposes and that makes them liable to property tax and it could not be said that the property is "set apart for public worship" and actually used for that purpose and no other under S. 83 of the District Municipalities Act. (1940) 2 M.L.J. 897, followed; I.L.R. (1939) 1 Cal. 277, distinguished.

B. Sitarama Rao and *C. S. Rama Rao Saheb* for Appellant in Appeal No. 293 of 1939 and for Respondent in Appeal No. 302 of 1939.

K. Rajah Aiyar and *T. A. Ramaswami Reddi* for Respondent in Appeal No. 293 of 1939 and for Appellant in Appeal No. 302 of 1939.

K.S.

[F.B.]
The Chief Justice, Krishnaswami Aiyangar and Happell, JJ.
27th October, 1941.

In re Venkatarama Sarma, a Pleader.
R.C. No. 26 of 1941.

Legal Practitoner—Professional misconduct—"Temporary misappropriation"—If ceases to be an offence.

There is no such offence as temporary misappropriation known to law. If a client's money is misappropriated even for five minutes, it is nevertheless a misappropriation.

Where a legal practitioner received a cheque on behalf of his client and cashed the same his duty is to pay the money forthwith to his client and if he avoids or delays payment with false excuses he is guilty of gross professional misconduct.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) in support of the motion.

P. Satyanarayana and *Kasturi Seshagiri Rao* for the Pleader.

K.S.

The Chief Justice and Happell, J.
28th October, 1941.

Sundararao Naidu *v.* Commissioner of the Corporation of Madras.
L.P.A. No. 31 of 1941.

Writ of Certiorari—*If can be granted where other remedy is available—Elections—If can be set aside by* certiorari *proceedings.*

Where a member had been declared to be duly elected to fill up a a vacancy in the Corporation Council and had taken the oath of office, an

order cannot be passed quashing all proceedings by the Commissioner holding such election. The proper procedure, when the validity of such an election is questioned is for the aggrieved party to file an election petition and a *writ of certiorari* cannot be issued as there was other suitable remedy available.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

A. Suryanarayaniah and *S. A. Seshadri Aiyangar* for Respondent.

K.S.

Somayya, J.
28th October, 1941.

Kalitheertha Pillai *v.* Chellathammal and others.
S.A. No. 409 of 1940.

Hindu law—Adoption—Joint family—Widow of coparcener adopting—Consent of divided sapinda *outside the family—If sufficient when surviving coparcener a lunatic incapable of giving consent.*

In an undivided Hindu family, the consent of the surviving coparceners must be obtained for validating an adoption by the widow of a predeceased coparcener as the widow has no independent or inherent power of adoption. The fact that the surviving coparcener was a minor or a lunatic unable to give his consent to an adoption, does not justify the widow in travelling outside the undivided family and making an adoption with the consent of the divided *sapindas*.

A. V. Viswanatha Sastri and *R. Sundaralingam* for Appellant.

K. R. Rangaswami Aiyangar and *S. Venkatesan* for Respondents.

K.S.

Wadsworth and Patanjali Sastri JJ.
29th October, 1941.

Somasundaram Chettiar *v.* Muthappa Chettiar.
Appeal No. 176 of 1939.

Insolvency—Practice—Decree passed against debtor before his adjudication—Official Receiver declining to prefer appeal—Right of insolvent to prefer the appeal.

A Nattukottai Chetty filed a suit against his agent for accounts and also charged him with liability in respect of certain transactions alleging misconduct on his part. The agent denied liability and contended that he was entitled to 'samans' from the principal on the profits earned during his agency. The suit was decreed and on the next day the agent was adjudged insolvent. The Official Receiver in whom his estate had vested declined to prefer an appeal against the decree.

Held, that the claim against the insolvent being a personal money claim, the insolvent himself could prefer the appeal as far as the money transaction was concerned.

Quaere: whether the insolvent could appeal as regards his claim for 'samans'.

V. Ramaswami Aiyar and *Halasyam* for Appellant.

R. Sundaralingam for Respondent.

K.S.

Horwill, J.
29th October, 1941.

The Public Prosecutor *v.* Verghese.
Crl. App. No. 569 of 1941.

Madras District Municipalities Act (V of 1920), S. 317—'Owner'—Meaning.

S. 317 of the District Municipalities Act makes only the owner liable to be punished for any construction or reconstruction of building; but the word 'owner' has a special meaning in the Act and includes a 'person for the time being receiving or entitled to receive whether on his own account or as agent the rent or profits of the property'. Accordingly the agent of an owner is liable to be proceeded against under S. 317 of the Act.

The Public Prosecutor in person.

Respondent not represented.

K.S.

Mockett and Kunhiraman, JJ.
31st October, 1941.

Raja Chidambaram Reddi *v.*
Venugopala Reddi and 2 others.
C.R.P. No: 1354 of 1940.

Practice—Jurisdiction—Suit filed in 1932 *at Trichinopoly relating to movables and immovables situated partly in the Trichinopoly District and partly in Burma—Burma ceasing to be part of India during pendency of suit—Effect on jurisdiction of the Court as to Burma properties.*

A suit was filed in 1932 at Trichinopoly for the recovery or in the alternative partition of movable and immovable properties situated partly in the Trichinopoly District and partly in Burma. While the suit was pending the Government of India Act (1935) came into force on 1—4—1937 by which Burma was separated from and ceased to be part of India.

Held, that the Trichinopoly Court was not deprived of its jurisdiction to proceed with the trial of the pending suit as to the properties in Burma. A subsequent enactment would not deprive a Court of its jurisdiction which it had at the commencement of the suit unless such later enactment by express words or by necessary implication deprived such Courts of their jurisdiction. I.L.R. 55 Mad. 801 and 47 M.L.J. 448, applied.

K. S. Sankara Aiyar for Petitioner.

Sir Alladi Krishnaswami Aiyar and *K. G. Srinivasa Aiyar* for Respondent.

K.S.

The Chief Justice
and Happell, J.
31st October, 1941.

Bhoovaraha Aiyangar, *In re.*
Crl. M.P. No. 1162 of 1941.

Defence of India Act (XXXV of 1939)*—Rules under r.* 130-*A, Cl.* (b) —Intra vires *the Central Government.*

R. 130-A, Cl. (*b*) is *intra vires* the Central Government. The power given to make rules with regard to arrest and trial includes power to make rules for the custody of persons pending trial. Accordingly no person accused of an offence under the Defence of India Act can be released on bail unless the Court was satisfied that there were reasonable grounds for believing that he was not guilty of such contravention of the defence of India Rules. The trial of such offences is governed by the special rules under the Defence of India Act.

K. Bhashyam Aiyangar and *J. E. Gundappa Rao* for Petitioner.

The Advocate-General and the Public Prosecutor for the Crown.

K.S.

Wadsworth and Patanjali Sastri, JJ.
13th October, 1941.

Vasudevan Nambudiri
v. Unnimaya Anteyanam.
C.R.P. No. 678 of 1940.

Madras Agriculturists' Relief Act (*IV of* 1938), *Ss.* 8 *and* 9—*Liability of coparcener joining in renewal of promissory note by manager—If entitled to have his liability scaled down as renewal of previous liability.*

It was contended that when an individual coparcener makes himself personally liable for a joint family debt, it must be deemed that there are two liabilities due from two persons one the liability due from the joint family 'person' and the other the liability due from the individual 'person' and therefore the individual coparcener becoming liable under a subsequent note cannot claim that his liability was in renewal of the earlier joint family liability.

Held, that apart from the pious obligation theory, when a junior coparcener joins in the execution of a document in renewal of a family debt for which he was previously liable only as a member of the joint family, he is entitled to have the debt scaled down as a renewal of the previous liability binding on himself. (1940) 2 M.L.J. 786 and (1941) 1 M.L.J. 39, referred.

K.P. Raman Menon for Petitioner.

P. Govinda Menon for Respondent.

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Karivaradaswami Goundeu
v. Karithruma Goundan.
Appeal No. 54 of 1939.

able under agreement—If can be varied tances of the estate.

...h regard to maintenance without any ...parties will not attempt to go behind it, there ...the agreement is subject to the usual incidents of ...be read and interpreted in that light. Contracts and ...provision of maintenance can be reconsidered and the ...ed up or down as the case may be when it is shown that there ... an alteration of the circumstances, that is, that circumstances ... which the contract was made have varied in such a way as to make ...it inequitable that the same provision should be made under the changed circumstances.

K. G. Srinivasa Aiyar for Appellants.

S. Parthasarathy, V. K. Thiruvenkatachari and *M.R. Narayanaswami* for Respondents.

K.S.

Burn and Lakshmana Rao, JJ.
14th October, 1941.

Govindaswami Naidu *v.*
Vijayammal.
A.A.O. No. 398 of 1940.

Practice—Succession certificate—Finding after summary inquiry that the petitioner was prima facie *entitled to a succession certificate—Reasons for the decision—If to be recorded.*

In holding after a summary inquiry that the petitioner was *prima facie* entitled to a succession certificate under S. 373 (3) of the Succession Act, it is not necessary for the District Judge to record the reasons for his decision.

S. Ramaswami Aiyar for Appellant.

K. V. Srinivasa Aiyar for Respondent.

K.S.

N R C

Wadsworth and Patanjali Sastri, JJ. Veerappa *v.* Lakshmayya.
24th October, 1941. **Appeal No. 206 of 1939.**

Limitation Act (IX of 1908), *S.* 19—*Reference in letter to "amount given to me previously"—How far sufficient acknowledgment of liability —Promise in letter to pay whatever may be due—Effect on advances barred on that date—Contract Act, S.* 25 (3).

Five sums were alleged to have been advanced in all to the debtor by the creditor. Rs. 1,000 on 14—10—1926, Rs. 2,000 on 8—1—1927, Rs. 130 on 1—3—1927, Rs. 2,500 on 11—5—1927 and Rs. 400 on 30—8—1927 making up a total of Rs. 6,030. The loans were not evidenced by any vouchers or entries in books of account. The debtor wrote to his creditor a letter on 17—7—1927 which contained the following passage: "The amount which you promised to send is Rs.1,100. The amount spent for household expenses at the time when I came to Bellary previously was Rs. 200. I spent this sum from out of the amount given to me previously. Hence please have the utmost consideration and send in all a sum of Rs. 1,300 inclusive of Rs. 200".

Held, that there was nothing in the letter to indicate that the debtor was acknowledging a subsisting liability to save limitation in respect of earlier advances.

Another letter dated 29—5—1933 said: "..........If I wait a little till there are demands for the lands they will fetch good prices. I will then sell them and discharge all your amounts".

Held, that here was a clear promise to pay whatever sums had been advanced by the creditor, which is enforceable under S. 25 (3) of the Contract Act, though some of the original advances might have become barred by limitation on that date.

K. Bhashyam Aiyangar and *D.R. Krishna Rao* for Appellant.

V. S. Narasimhachar, M.S. Ramachandra Rao and *A. Bhujanga Rao* for Respondents.

K.S.

Somayya, J. Visalakshi Ammal *v.*
27th October, 1941. Coimbatore Janopakara Nidhi, Ltd.
S.A. No. 863 of 1940.

Contract Act (IX of 1872) *(after amendment of* 1930), *S.* 178-*A*—*Jewels entrusted for safe custody—If can be the subject of a valid pledge by the depositee.*

The new S. 178-A of the Contract Act applies only to cases where the pawnor obtained possession of the goods under a contract which is bad under Ss. 19 and 19-A. But where jewels entrusted for safe custody were pawned and the pawnee took the pledge in good faith, the case is not covered by S. 178-A as the pawnor has only bare custody and nothing more and the old rule that a person cannot give his alienee a higher title than what he himself has continues to apply. Accordingly the pledge is not valid.

S. Panchapagesa Sastri and *G. Natarajan* for Appellants.

P. V. Rajamannar and *K. Subba Rao* for Respondents.

K.S.

Horwill, J. Ramachandra Rao *v.*
31st October, 1941. Chinnayya Goundan.
Cr. R. C. No. 399 of 1941.

Criminal Procedure Code (V of 1898), *S.* 197—*Health Officer beating complainant in objecting to complainant's tying a cow to a tree—Sanction of local Government for complaint—Necessity.*

A complaint was filed to the effect that the Municipal Health Officer came to him after the complainant had tied a cow to a tree, gave him a smack on the neck and told him that he had no business to tie the cow there. He said to the Health Officer that if he had been told that he should not tie the cow there, he would not have done so. The Health Officer thereupon lost his temper and gave the complainant some further blows. On a preliminary objection to the complaint,

Held, that sanction of the local Government under S. 197, Criminal Procedure Code is necessary before the complaint could be filed, though it was not part of the duty of the Health Officer to strike the complainant. S. 197, Cr.P.Code is intended to protect public servants from frivolous complaints made while they are doing their duty as public servants.

J. Krishnamurthi for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

Respondent not represented.

K.S.

Wadsworth and Patanjali Sastri, JJ. — Nalanunni *v.* Dakshayani Amma.

3rd November, 1941. — **Appeal No. 266 of 1939.**

Madras Agriculturists' Relief Act (IV of 1938), *S.* 14—*How far applicable to Marumakkathayam and Aliyasanthana tarwads—Personal liability of executants who were members of tarwad—Whether excluded by S.* 14.

S. 14 of Madras Act IV of 1938 applies to Marumakkathayam families also and the members of such debtor families are liable only for their portion of the debt from out of the tavazhi properties. But S. 14 does not cover the personal liability of the executant members, and as such they are liable for the full amount of the debt without any scaling down.

B. Sitarama Rao and *D. A. Krishna Warriar* for Appellants.

P. Govinda Menon for Respondents.

K.S.

Horwill, J. — Varadarajulu Chetty, accused.

3rd November, 1941. — **Cr.R.Case No. 873 of 1941. (Cr.R.P. No. 821 of 1941.)**

Defence of India Act (XXXV of 1939), *S.* 34 (6)—*Scope and applicability—Act when applicable to speech relating to trade and industrial disputes—Same speech offending more than one provision of the Act—Accused whether liable to more than one conviction.*

An accused cannot be convicted three times for the same speech on the ground that the speech offended against the provisions of S. 34 (6) (*e*), (*f*) and (*g*). What is punishable is the doing of a prejudicial act within the meaning of S. 38 (1) (*a*) and the prejudicial act in the present case was the making of a speech. An objectionable remark in a speech cannot constitute several prejudicial acts merely because it is a prejudicial act in several ways. Though it would be ordinarily unfair to apply the Defence of India Act to a speech made for the purposes of promoting the welfare of the workers in a trade and industrial dispute, the Act can be applied where the speech is a wild one tending to endanger the public safety and hinder the defence of British India during a grave emergency like the war, and was likely to influence adversely the war effort of the whole body of listeners and fellow-workers of the accused.

N. D. Varadachari for *R. Chakravarthi* for Accused.

K. V. Ramaseshan for Crown Prosecutor on behalf of the Crown.

K.S.

Venkataramana Rao, J.
10th November, 1941.

Sankaralingam Pillai
v. Veluchami.
S.A. No. 1113 of 1938.

Hindu law—Adoption—Widow adopting after a bona fide *partition among surviving coparceners of her husband—Effect—Adoption valid—Adoptee's right to re-open partition and claim a share.*

A Hindu joint family consisted of four brothers two of whom died issueless leaving their respective widows. The surviving brothers effected a *bona fide* partition among themselves in 1936. Thereafter each of the two widows of the deceased brothers adopted sons to their respective husbands and one of the adopted sons brought a suit for partition claiming his one-fourth share in the family properties.

Held, (affirming the decision of the Courts below) that the adoptions were valid and that the adopted sons were in the same position as posthumous sons and therefore entitled to re-open the partition and claim their respective shares in the family properties. 12 Pat. 642 (P.C.); 59 Bom. 360 (P.C.); and 9 Mad. 64 (F.B.), relied on.

I.L.R. (1937) Bom. 508; I.L.R. (1939) Bom. 512; I.L.R. (1940) Bom. 42, dissented from.

K. Rajah Aiyar for Appellant.

B. Sitarama Rao, R. Ramasubbu Aiyar, V. Ganapati, S. K. Sundaram and *N. R. Govindachari* for Respondents.

K.S.

[F.B.]

The Chief Justice, Krishnaswami Aiyangar and Happell, JJ.
10th November, 1941.

Polovarupu Lingayya *v.* Punnayya.
S.A. No. 218 of 1939.

Hindu law—Debts—Joint family—Sale of family property by father set aside on the ground of absence of family necessity—Claim by vendee for recovery of the purchase price from the sons—Pious obligation rule—Applicability.

Where a sale of joint family property by a father had been set aside after the father's death except as to his own share, as there was no family necessity, it will be competent to the vendee to recover by a separate suit from the family property in the hands of the sons, the proportionate part of the purchase price with interest thereon by reason of the sons' pious obligation. 31 M.L.J. 502, approved; 44 Mad. 801, not approved.

There is a contingent liability on a vendor to indemnify the purchaser in case there is a failure of consideration such as when a sale is set aside at the instance of the sons on the ground that the alienation was not for a necessary purpose.

Such a contingent liability is "Rina" which the Hindu sons are bound to discharge. Meaning of "Rina" as explained in (1939) 1 M.L.J. 352, approved and affirmed. Therefore the fact that the father had died when the sale was actually set aside did not matter as there was already a "Rina" of the father.

B. V. Ramanarasu for Appellant.

K. Umamaheswaram for Respondent.

K.S.

Venkataramana Rao and Abdur Rahman, JJ.
21st October, 1941.

Narayanan Nambudiri *v.* Chathukkutti Nayar.
Appeal No. 437 of 1938 and C.M.P. No. 5946 of 1941.

Malabar Compensation for Tenants' Improvements Act (I of 1900), *S.* 6 (2)—*Decree for arrears of rent barred by limitation—If can be set off against 'improvements' decreed in favour of tenants—Such decree for rent if liable to scaling down under Madras Act IV of* 1938.

A decree for arrears of rent though barred by limitation can be set off in taking accounts under S. 6 (2) of the Malabar Compensation for Tenants' Improvements Act, against improvements decreed in favour of the tenants. In respect of such decree for arrears of rent passed before the Agriculturists' Relief Act came into force S. 15 of that Act not being retrospective can have no application as the rent wiped out after the set off, cannot be regarded as payable after Act IV of 1938 came into force.

K. Kuttikrishna Menon for Appellants.

P. Govinda Menon for Respondents.

K.S.

Horwill, J.
24th October, 1941.

Veeraswami—Accused.
Crl.R.C. No. 822 of 1941.
(Case Referred No. 48 of 1941).

Penal Code (XLV of 1860), *Ss.* 380 *and* 420—*Property taken away from servant of owner by cheating—Conviction for 'theft in a building', by Sub-Magistrate with no power to try an offence under S.* 420—*Propriety.*

Accused went to the house of the complainant and represented to a servant who was in the house that his master had sent him to take certain vessels. The servant thereupon handed over the vessels to the accused, who went away with them.

Held, that though the offence of cheating was committed by the false representation to the servant, that does not mean that there was no offence of theft in a building. Though a Sub-Magistrate could not have tried a case punishable under S. 420, I.P.Code, if in fact the Sub-Magistrate did not realise that an offence had also been committed under S. 420, I.P.Code, a conviction under S. 380 by such a Magistrate is proper and not without jurisdiction.

Accused not represented.

The Public Prosecutor (*V.L. Ethiraj*) for the Crown.

K.S.

King, J.
24th October, 1941.

Raja of Ramnad *v.* Ataichi Thevar.
S.A. Nos. 266 of 1938, etc.

Madras Estates Land Act (I of 1908), *S.* 12—*Levy of tax on trees—Right of the land-holder.*

The Ramnad Estate sought to recover rent from a number of ryots of the estate in respect of the use and enjoyment of trees grown in their holdings after Act I of 1908 came into force. The lower Courts found that the lands in the ryots' holdings were patta lands for which *tirwa* was payable unless cultivation was not possible for no fault of the ryots. They negatived rights in the estate to get tax for the trees under the circumstances.

Held, that the object of S. 12 of the Estates Land Act was to negative any rights of the Zamindar in the trees grown after the Act came

into force and the levy of any tax for such trees on any ground will be in violation of that object and in derogation of the absolute rights in the trees contemplated by S. 12.

K. Kuttikrishna Menon for Appellant.

K. Bhashyam Aiyangar, T. R. Srinivasan and *K. Raja Aiyar* for Respondents.

K.S.

Abdur Rahman, J.
31st October, 1941.

Sethuramasubramania Pillai *v.* Abraham.
C.R.P. Nos. 499, etc., of 1940.

Madras Estates Land Act (I of 1908)—Tenants evicted—Suit for recovery of possession by them asserting that they were permanent tenants—Maintainability in Civil Courts—Application for leave to sue in forma pauperis*—Maintainabilty.*

Where evicted tenants apply for leave to sue *in forma pauperis* in Civil Courts alleging their being permanent tenants as a ground of their title, for the suits which they intend to file for the recovery of possession of the lands from which they have been according to them unjustly evicted by their landlord, it would be for the Civil Court to decide whether they have the title which they assert for recovering possession, and their application for leave to sue *in forma pauperis* cannot be rejected.

S. P. Vasudevan for Petitioner.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondent.

K.S.

Kunhi Raman, J.
31st October, 1941.

Venkatappa *v.* Narasappa.
C.R.P. Nos. 1439 to 1441 of 1940.

Madras Estates Land Act, (I of 1908), S. 163 (a) (as amended)—Applicability—Suit to evict trespassers—Maintainability in Civil Court.

The plaintiff was the assignee of a half share in a shrotriem village. The entire village belonged to the plaintiff's uncle *P* who married *K* and had a son *S* by her. Subsequent to the birth of *S*, *P* sued for a partition of the village into two equal shares and for separate possession against his son, a minor represented by his mother *K* and a decree was obtained in which the suit properties were allotted to the share of *P* who assigned the decree to the plaintiff out of natural love and affection and also executed a deed of gift in plaintiff's favour conveying his half share in the shrotriem. *K* disputed the transfer to the plaintiff and professed to give a lease of the entire shrotriem village to *X* who induced others to cultivate the lands in the village. Plaintiff sued the lessees alleging that they were trespassers liable to be evicted from the suit lands.

Held, that had the defendants been admitted as tenants by the plaintiff or had they been recognised as such by her, the Civil Court would not have jurisdiction to entertain the suit in ejectment which would in that case have to be filed in a revenue Court. Since the defendants were admitted by *K* who had no title to the whole village the defendants were in respect of the plaintiff's share trespassers and S. 163-A of the Estates Land Act applied to the case and the plaintiff was entitled to file the suit in a Civil Court. I.L.R. 38 Mad. 1155; 27 M.L.J. 490 and A.I.R. 1940 Mad. 451, distinguished.

R. Ramalinga Reddi for Petitioner.

V. S. Narasimhachar for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
3*rd November,* 1941.

Ramaswami Naicker *v.* Gopala Naicker.
App. No. 235 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 8—*Debt due jointly and severally from A and B included in fresh document executed by A alone —If in renewal of earlier one—Question of consideration which passed between the joint debtors—If material.*

Where there is a debt due from *A* and *B* jointly and severally which is included in a fresh document executed by *A* alone, *A* can claim that the second debt is a renewal of the first. It is no concern of the Courts in scaling down such debt to go into the question of what consideration passed between the two joint debtors in order to induce one of them to undertake the liability alone. It is not possible to look into the motives or the consideration for the disappearance of the co-debtor. The fact that *B* can be shown to have got rid of his liability under the first note by a transfer of another mortgage to *A* and that showed that each of the debtors held himself liable only for half the amount under the first note cannot induce the Court in scaling down to hold that the second note was not a renewal to the full extent of the earlier liability.

R. Desikan for Appellant.

N. Somasundaram for Respondent.

K.S.

Somayya, J.
4*th November,* 1941.

Raja Sir Annamalai Chettiar *v.* Desai Krishnama Chetty.
S.A. No. 298 and A.A.O. No. 232 of 1940.

Transfer of Property Act (IV of 1882), *Ss.* 109 *and* 111 (*g*)—*Scope—Notice of forfeiture of lease given by lessor after transfer of his property available to transferee from lessor.*

The wording of S. 109 of the Transfer of Property Act is different from S. 10 of the English Conveyancing Act, 1881, and hence the decisions construing the latter as not conferring upon the transferee from the lessor a right to give notice in cases of breaches before the transfer are not applicable to cases arising under the Transfer of Property Act. Cases in India are governed by the express language of S. 109. Accordingly a notice given by a lessor after transfer asking the lessee to surrender the property is invalid and ineffective as a notice of forfeiture under S. 111 (*g*) of the Transfer of Property Act.

V. Ramaswami Aiyar for Appellant.

V. T. Rangaswami Aiyangar and *K. S. Sankararaman* for Respondent.

K.S.

Abdur Rahman, J.
7*th November,* 1941.

Subbaraya Pillai *v.* Rajammal and others.
S.A. No. 564 of 1939.

Hindu law—Limited owner—Gift of properties—Reversioner attesting —Attestation whether imported knowledge.

Two limited owners divided the last male owner's properties excluding rights of survivorship. One of the limited owners made a gift of the properties she got under the partition and the reversioner attested the deed. After the death of the limited owner who gifted the properties (the other having died before), the reversioner filed a suit to get possession of the properties alleging the invalidity of the gift beyond the donor's lifetime. The suit was dismissed by the lower Courts applying 52 Mad. 556 (F.B.).

Held, that mere attestation cannot import knowledge of the contents of the document; positive proof of knowledge was essential to invoke the "stringent equity" of estoppel.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

T. E. Ramabhadrachariar for Respondent.

K.C.

The Chief Justice and Burn, J.
13th November, 1941.

T.N. & Q. Bank, Ltd., by Official Liquidators *v.* N.S.V. Subbayya Nadar.
Appeal No. 276 of 1939.

Contract Act (IX of 1872), S. 139—Surety for particular accommodation account with bank—Bank giving accommodation to creditor on another independent account on security of immovable property of creditor, without knowledge or consent of surety—Effect on liability of surety.

A bank gave accommodation to a firm and a surety guaranteed the account. Without the knowledge and consent of the surety the bank subsequently gave the firm an accommodation in a separate account on the security of the immovable properties belonging to the members of the firm. But the accounts continued to be operated for sometime. Then the bank sued the principal debtors and the surety.

Held, that the opening of the second and independent account was not inconsistent with the rights of the surety and did not discharge the surety. 1 T.L.R. 63 and 20 C.W.N. 562, relied on.

Dr. V. K. John, R. Rajeswara Rao and *D. Noronha* for Appellants.

B. Sitarama Rao and *A.V. Narayanaswami Aiyar* for Respondent.

K.S.

Burn, J.
14th November, 1941.

Khizar Muhammad *v.* Abdul Razack Sahib.
C.M.P. No. 655 of 1941.

Practice—Civil Revision Petition—Dismissal for default—If can be restored.

There is no power under the Code of Civil Procedure to restore to file a Civil Revision Petition dismissed for default. S. 107 and O. 9, r. 9 of the Civil Procedure Code, have no application. There seems to be no inherent power either to restore such petition. A power to dismiss such a petition does not necessarily imply a power to restore the same.

S. A. Ahmed Meeran and *C. A. Mohammad Ibrahim* for Petitioner.

S. T. Srinivasagopalachari for Respondent.

K.S.

Venkataramana Rao and Abdur Rahman, JJ.
29*th October*, 1941.

Rayalamma *v.* Butchiramayya.
App. No. 174 of 1938.

Interest Act (XXXII of 1839), *S.* 1—*Scope—Owelty payable under partition—Nature of—Interest on—If can be awarded.*

Per Venkataramana Rao, J.—Where a sum of money is to be paid by a person who takes the A schedule property under a partition to the person who takes the B schedule properties by way of equality of partition or what is termed as "owelty", that amount is always regarded in a Court of equity as in the nature of a sum due to the vendor of land from his vendee. One co-sharer parts with a portion of the property as representing the share he is legitimately entitled to in consideration of a sum of money in respect whereof he must be regarded as the vendor and the person who takes the property must be regarded as the vendee. Interest can therefore be awarded on such amount.

Per Abdur Rahman, J.—Though the jural relationship of the parties to a partition was not one of those stated in Hals. Vol. XXI, pp. 40 and 41, yet having regard to the fact that the defendants had been realising the income of the plaintiff's share in the joint family property under the deed of partition without discharging the debt they were liable to pay thereunder, it may not be incorrect to award interest under the proviso to S. 1 of the Interest Act even if the analogy of a vendor and purchaser may not be strictly applicable to the case.

43 Bom. 181, relied on.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *Ch. Raghava Rao* for Appellants.

V. Govindarajachari and *M. S. Ramachandra Rao* for Respondents.

K.S.

Somayya, J.
5*th November*, 1941.

Ramachandramurthi *v.* Lachamma.
A.A.A.O. No. 244 of 1939.

Limitation Act (IX of 1908), *Art.* 182 (5)—*Applicability—Application for restitution—Final order on last application—If saves limitation.*

An application for restitution is an application for execution so as to attract the rule that a final order on a previous application gives a fresh starting point. The mere fact that a relief was asked which ultimately was held not grantable under that order or decree does not make the previous application not one in accordance with law.

K. Kameswara Rao for Appellant.

K. Bhimasankaran for Respondent.

K.S.

Wadsworth. J.
7*th November*, 1941.

Mallayya *v.* Mallayya.
C.R.P. No. 253 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 8 and 9—*Pronote in favour of* A *the brother of* B *in* 1931 *when they were undivided—Fresh note of* 1933 *in favour of* B *in discharge of the earlier one—Partition between* A *and* B *in* 1932—*Note assigned in* 1937 *to* A *who sued on it—If suit can be dismissed on failure of* A *to produce the earlier note—Scaling down—Principles.*

The plaintiff sued on a note executed by the second defendant in favour of the plaintiff's brother the first defendant on 14—4—1933, which was assigned to the plaintiff on 2—8—1937. It was found that the second defendant was an agriculturist. It was in evidence that the suit note of 1933 actually discharged an earlier note of about the year 1931 executed in favour

of the plaintiff himself at a time when the family was undivided, the partition being in 1932. The lower appellate Court found that the creditor had not fulfilled his duty of putting before the Court the materials necessary for scaling down the debt because of the non-production of the prior document of 1931 and that in the absence of proof of the documents necessary in order to ascertain the original principal no decree could be given against the second defendant. On revision,

Held:—No doubt, in a case in which it can be shown that the creditor has wilfully failed to produce earlier documents which ought to be looked into for the purpose of scaling down the debt the Court would be entitled to draw an inference adverse to the creditor from the non-production of those documents. [Error in report of C.R.P. No. 331 of 1939 in (1940) 2 M.L.J., N.R.C. 27 pointed out.] But as the suit note itself was executed in favour of the first defendant in discharge of an earlier note executed in favour of the first defendant in discharge of an earlier note executed in favour of the plaintiff, the fact that the suit note was subsequently assigned to the plaintiff would not make the note a renewal of an earlier debt in favour of the same creditor. As the first note was executed in favour of the plaintiff as representing the joint family and the second one was executed in favour of the first defendant as a member of that family to whom the debt had been assigned on partition it could not be said that the creditors were the same in the two transactions. If the note of 1931 had been assigned to plaintiff before it was discharged by the note of 1933 there would be a renewal in favour of the same creditor but no such case was pleaded. Accordingly the suit ought not to be dismissed solely for the reason that the plaintiff had not produced the materials necessary to scale down the debt but must be decreed as scaled down under S. 9 of the Act.

P. Chandra Reddy for Petitioner.

E. Venkataramana Rao for Respondent.

K.S.

Horwill, J.
13*th November*, 1941.

Appasami Mudaliar, accused.
Crl.R.C. No. 757 of 1941.
(Crl.R.P. No. 711 of 1941).

Madras General Sales Tax Act (*IX of* 1939), *Ss.* 11 *and* 15 (*b*)—*Person called upon to pay a tax of Rs.* 30 *on or before a certain date—Failure to pay—Prosecution during pendency of appeal against imposition of the tax—Propriety.*

S. 11 of the Sales Tax Act indicates that where a person is taxed to a lump sum, he need only pay during the pendency of an appeal against the taxation what he admits to be due but if he is ordered to pay a tax by instalments he has to pay the accrued instalments whether he admits them to be due or not. In any event the person should not be prosecuted while his appeal against the order taxing him was still pending, for non-payment of the tax which in fact was ultimately found not to be due.

V. V. S. Sastri for *Ch. Raghava Rao* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Wadsworth, J.
14*th November*, 1941.

Appukutti Nambiar *v.*
Cheruvath Nambiar.
C.R.P. No. 360 of 1940.

Madras Agriculturists' Releif Act (*IV of* 1938), *S.* 15 (4)—*Deposit in respect of one out of twelve items in a holding—Satisfaction of claim for arrears of rent in respect of such item—If can be recorded—Malabar Tenancy Act* (*XIV of* 1930), *S.* 3.

A holding is a parcel or parcels of land held under a single arrangement by a tenant from a landlord. So where twelve items were held under

a single engagement they would form a single holding forming security for a single kanom amount to be redeemed as a single tenure which neither party can split up at will. Therefore a deposit of rent under S. 15 (4) of Madras Act IV of 1938 cannot be made in respect of one item only and relief obtained in respect thereof.

K.P. Ramakrishna Aiyar and *S. Krishnamurthi* for Petitioner.

P. Govinda Menon for Respondent.

K.S.

Horwill, J.
14th November, 1941.

Mariasoosai *v.* Arokkiam.
Cr.R.C. No. 810 of 1941.
(Cr.R.P. No. 761 of 1941).

Criminal Procedure Code (*V of* 1898), *S.* 422—*Appeal against conviction allowed—Notice to complainant who was awarded compensation not given—Effect.*

Where in an appeal against conviction the matter has been fairly heard after notice to the Crown and after hearing the Public Prosecutor, and where a proper judgment has been written, it would be grossly unfair to require an accused who had been acquitted to go through a fresh ordeal because the appellate Judge had heard only the Public Prosecutor (which is all that is required under S. 422 of the Code of Criminal Procedure) and not the complainant's vakil also. There is neither any irregularity nor illegality in not giving notice to the complainant merely because he was awarded compensation under S. 545 of the Cr.P.Code.

J. S. Vedamanickam for Petitioner.

T. S. Vaidyanatha Aiyar for Respondents.

The Public Prosecutor (*V.L. Ethiraj*) on behalf of the Crown.

K.S.

Horwill, J.
14th November, 1941.

Public Prosecutor *v.* Papanna.
Crl. Appeal No. 644 of 1941.

Factories Act (*XXV of* 1934), *S.* 60—*Owners and occupiers of factory —If can escape liability for contravening Act by leaving the affairs of the factory in the hands of a manager.*

The owners and occupiers of a factory cannot relieve themselves of their responsibilities regarding compliance with the requirements of the Factories Act by appointing a manager; they must see that the manager carries out his duties. It is only when the manager has acted in express disobedience of their order and they have done their best to see that the provisions of the Act are complied with, that they can themselves escape liability. S. 60 makes it clear that both the manager and occupier are liable.

A manager is not a "managing agent" referred to in the proviso to the definition of "occupier" and therefore the manager cannot be deemed to be the occupier of the factory. The ignorance of the occupiers however may be a ground for awarding a smaller punishment but not for acquitting them.

Appellant in person.

V. V. Chowdhry for Respondent.

K.S.

Wadsworth, J.
14th November, 1941.

Bhushigadu *v.*
Veeramma.
C.R.P. Nos. 2511 to 2521 of 1939, etc.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 15—*Order of a Deputy Collector under—If open to revision by District Collector under S.* 205, *Madras Estates Land Act.*

The District Collector has no jurisdiction under S. 205 of the Madras Estates Land Act to revise an order of the Deputy Collector passed under S. 15 of the Madras Agriculturists' Relief Act. The powers of revision under S. 205 of the Madras Estates Land Act clearly relate to proceedings under Estates Land Act and not to proceedings under other Acts.

Y. G. Krishnamurthi for Petitioner.

Respondent not represented.

K.S.

Kuppuswami Ayyar, J.
14th November, 1941.

Hanumantha Reddy *v.*
Golla Bodanna.
C.R.P. No. 2351 of 1940.

Practice—Decree on promissory note for payment of amount in eight annual instalments—No default clause—Propriety—Interference in revision.

Where a decree on a promissory note directed the payment to be made in eight annual instalments without making any provision regarding default of payment on due dates,

Held, that such direction was improper in that it denied virtually the plaintiff's rights. The decree was accordingly modified by directing the amount to be paid in quarterly instalments and that if there was any default in payment of any one of the instalments the whole amount shall become due.

54 All. 539, relied on.

S. Narasimha Aiyangar for Petitioner.

Respondent not represented.

K.S.

Horwill, J.
17th November, 1941.

Krishnappa Chettiar and another
Appellants.
Appeal No. 447 of 1941.

Court-fees—Partition suit—Coparcener claiming that he had lent an amount to the manager and that it should be taken into account in the partition—Finding that there was no such debt—Appeal—To bear ad valorem *court-fee.*

In a partition suit the defendant a brother, claimed that he lent a certain sum of money to his father who was then the manager of the family and that that sum of money should be taken into account in partitioning the property. It was held by the trial Court that no such debt was due by the family to the defendant. In an appeal against that finding,

Held, that the claim in appeal cannot be said to be incapable of valuation and therefore the appellant will have to pay court-fee *ad valorem*.

A. C. Sampath Aiyangar for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S.

Kuppuswami Ayyar, J.
14th November, 1941.

Rangaswamy Aiyangar *v.* Conjeevaram Co-operative Central Bank, Ltd.
C.R.P. No. 1134 of 1940.

Madras Co-operative Societies Act (VI of 1932), *S.* 51—*Scope—Dispute relating to provident fund amount due to a dismissed servant—Whether cognizable by Civil Court or should be decided only by Registrar or arbitrator.*

The provident fund amount due to a servant of a Co-operative Society represents the amount payable to him in respect of deductions from his monthly salary made under the rules, on the understanding that the same with some additional sum by way of interest would be repaid to him at the end of his service or dismissal. The claim by a dismissed servant constitutes a dispute touching the business of a registered society in its wider sense. Such a claim would come also under the narrower sense of the term "business", for it relates to the banking business.

Such a claim falls within the purview of S. 51 of the Madras Co-operative Societies Act and is not cognizable by a Civil Court. The proper tribunal is the one under S. 51 of the Act. The substitution by Madras Act VI of 1932 in S. 51 of the expression "shall" instead of the corresponding provision "may", in the rules framed under S. 43 of Central Act II of 1912, indicates that the object of the Legislature was to constitute a single special tribunal for the purpose of deciding such disputes.

Sundararajan and *Sivaswami* for Petitioner.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondents.

K.S.

Wadsworth, J.
14th November, 1941.

Kuppana Goundan *v.* Vellayappa Goundan.
C.R.P. No. 812 of 1940.

Madras Agriculturists' Relief Act (IV of 1938)—*Pro-note representing interest due on a mortgage of* 1928—*Assignment to plaintiff in* 1939—*Liability under note affected by Act IV of* 1938.

A promissory note representing interest due on mortgages of 1928 was assigned in January, 1939 to the plaintiff who took the note without knowing that it represented interest due on earlier mortgages. In a suit to enforce the promissory note,

Held: The want of knowledge of the plaintiff as to the nature of the consideration will not prevent the Madras Agriculturists' Relief Act from operating upon the debt. There is no protection for a holder in due course against a statutory reduction of liabilities.

K. S. Ramamurthi for Petitioner.

T. V. Muthukrishna Aiyar for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
17th November, 1941.

Venkatakrishnayya *v.* Malakondayya.
C.R.P. No. 156 of 1939.

Provincial Insolvency Act (V of 1920), *S.* 6 (*e*)—*Order of adjudication based on a sale in execution as act of insolvency—Sale subsequently set aside—Adjudication order—If to be cancelled.*

Under S. 6 (*e*) of the Provincial Insolvency Act a debtor commits an act of bankruptcy if any of his property has been sold in execution of the decree of any Court for payment of money. The question whether the sale is eventually set aside for some irregularity or whether the debtor eventually finds it to his interest to deposit the amount of the particular decree is not really material and does not alter the fact that the property was sold in

execution of a decree. Accordingly the setting aside of the sale is not a sufficient reason for cancelling the order of adjudication.

A. Bhujanga Rao and *M. S. Ramachandra Rao* for Petitioner.

K. Kotayya and *T. Rajagopalan* for Respondents.

K.S.

Horwill, J.
19th November, 1941.

Bapiraju *v.* Veerraju.
Crl.R.C. No. 341 of 1941.
(Crl.R.P. No. 324 of 1941).

Criminal Procedure Code (V of 1898), *S.* 488—*Petition by wife for maintenance—Dismissal by consent on parties composing their differences—Subsequent ill-treatment by husband—Wife if precluded from making fresh application under S.* 488.

After a wife filed a maintenance petition against her husband, the parties composed their differences and the wife agreed to go back and live with her husband and he agreed to keep her. The maintenance petition was therefore dismissed by consent. The wife went and lived with her husband. Subsequently being ill-treated by her husband she was compelled to leave him. She therefore filed another petition under S. 488, Criminal Procedure Code for maintenance for herself and her son.

Held, that the wife was not precluded from going to the Criminal Court again on a fresh cause of action, namely, the subsequent ill-treatment.

V. Parthasarathi for Petitioner.

Respondent not represented.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Horwill, J.
24th November, 1941.

Veerappan Chetty, *In re.*
Crl.R.C. No. 713 of 1941.
(Crl.R.P. No. 669 of 1941.)

Madras Port Trust By-laws—By-law 2, *Cl.* (3)—*Person with dealer's token loitering in harbour otherwise than on business for which he had token—If trespasser.*

The accused having a dealer's token (which entitled him to enter the premises of the harbour for the purpose of transacting his business, which is that of a merchant who sends goods abroad and receives goods by ships coming from other parts) was found loitering in the harbour without any *bona fide* business but to see a friend off. He was convicted under by-law 2, Cl. (3) of the Madras Port Trust By-laws for loitering and sentenced to a fine of Rs. 10. On revision,

Held, that having regard to the special definition of "trespass" in that by-law only a person not in possession of a token found on the harbour premises can be punished. Where a person misused a token the only remedy of the authorities is to cancel the token.

M. K. Harihara Aiyar for Accused.

C. D. Venkataraman for the Crown Prosecutor for the Crown.

K.S.

Patanjali Sastri, J.
14th November, 1941.

Subbayya *v.* Venkatayya.
S.A. No. 728 of 1939.

Injunction—Person found to be in possession and enjoyment of properties for long time—Alleged attempt to oust him from possession by persons claiming title—If can be restrained by injunction without deciding question of title.

Where it is found that plaintiffs had been in possession for a long time, the plaintiffs' possession and enjoyment are entitled to protection at the hands of the Court even against those who may be entitled to the property. The question of title need not be gone into or determined in such proceedings. Even if the plaintiffs are ousted from possession, they would be entitled to get back their possession by a suit under S. 9 of the Specific Relief Act.

K. S. Jayaram for Appellants.

Kasturi Seshagiri Rao for Respondent.

K.S.

Somayya, J.
18th November, 1941.

Vaidyanatha Bhattar *v.* Madavarvilagam Sri Vaidyanathaswami Koil Devasthanam.
S.A. No. 1013 of 1939.

Limitation Act (IX of 1908), *Arts.* 102 *and* 120*—Applicability—Suit for honours and perquisites by person holding office of Archaka, Sthanika, Karuvelan and Periathanam in temple—Limitation.*

A suit claiming certain temple honours (though there may be some perquisites attached to them) cannot be said to be a claim for 'wages' falling under Art. 102 of the Limitation Act. Such a suit is governed by Art. 120. The term 'wages' cannot be applied to a case where certain honors and perquisites are claimed not as remuneration for work done and not periodically but only on special occasions of auspicious and inauspicious ceremonies.

V. Ramaswamy Aiyar for Appellant.

S. Panchapagesa Sastri and *T. R. Sangameswaran* for Respondent.

K.S.

Burn, J.
19th November, 1941.

Hanumantha Rao *v.* Ramayya.
S.A. Nos. 116 and 203 of 1939.

Tort—Libel—Privilege—Defendant in suit for damages for wrongful dismissal filing extracts from reports by him to show the grounds for dismissal—Extract defamatory of plaintiff—Absolutely privileged.

The defendant, a Headmaster, having been sued for damages for wrongful dismissal thought it necessary for the purpose of his defence to show the grounds upon which the plaintiff, a teacher, was dismissed by the managing committee. The defendant filed extracts from a report made by him to the school committee and such extracts were found to be defamatory of the plaintiff. In an action for damages for alleged libel,

Held, that the occasion was one of absolute privilege as the statement was made in Court in the course of and for the purpose of defence. Whether or not writs, pleadings and affidavits are governed by the law of absolute privilege depends entirely on the nature of the statements in writing that are filed and the purpose for which they are filed. If they are documents considered by a party as being essential for his defence they are covered by the doctrine of privilege.

(1938) 2 M.L.J. 340, distinguished.

Ch. Raghava Rao and *V. Govindarajachari* for Appellants.

P. Satyanarayana Rao for Respondents.

K.S.

Venkataramana Rao and Abdur Rahman, JJ.
20th November, 1941.

Narasimhamurthy *v.* Kantamma.
Appeals Nos. 395 of 1938 and 57 of 1939.

Hindu law—Will executed by a Hindu—Subsequent adoption—If to be deemed as revoking will.

A will cannot be deemed to have been revoked in law merely by reason of a subsequent adoption made by the testator during his lifetime and the legatee under the will is entitled to take the self-acquired properties of the testator bequeathed under the will. A bequest of a mortgage or debt under a will cannot be held to cover any property subsequently purchased out of the mortgage money realised by the testator nor can it cover even the mortgaged property purchased by him. Unless the language of the will be construed to be appropriate as applied to the state of things that existed at the date of the testator's death, the bequest of such mortgages and debts which have been realised must be regarded as of no effect.

V. V. Srinivasa Aiyangar and *B. Lakshminarayana* for Appellant.

P. Somasundaram, P. Suryanarayana and the Government Pleader for Respondents.

K.S.

Horwill, J.
21st November, 1941.

Oomayan, Accused.
Crl.R.C. No. 994 of 1941.
(Crl.R.P. No. 937 of 1941.)

Criminal Trial—Evidence—Foot-print expert—Evidence of—Value.

Experts in foot-prints are not recognised by the Evidence Act, but a Magistrate can take into consideration the evidence of a person who has seen a foot-print and taken the foot-prints of the accused and found that they are similar. But that evidence is not sufficient to bring home the offence to the accused in the absence of further knowledge regarding the differences between one foot and another.

A. S. Sivakaminathan for *A. V. Narayanaswami Aiyar* for Accused.

The Public Prosecutor (*V.L. Ethiraj*) on behalf of the Crown.

K.S.

Wadsworth, J.
21st November, 1941.

Venkatasubba Baghavathar *v.* Manager, L.F. Chatram, Tirukurugudi.
C.R.P. No. 724 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (c)—"Any other sum by way of loan or otherwise"—Whether to be construed ejusdem generis *with "tax or cess"—Rent due in respect of* chatram *estate managed by District Board—If falls under S. 4 (c).*

When rent is paid to the District Board as manager of a *chatram* Estate it is a payment to the District Board as such, of money which goes into the funds of the District Board, though earmarked for a particular purpose. The payment of rent in such circumstances would come within the category of "any other sum due to them by way of loan or otherwise", in S. 4 (c) of Act IV of 1938 and the exemption specified in that section will cover that liability even though it partakes of the nature of rent. It makes no difference whether the rent in question be an ordinary contractual rent or a rent governed by the special provisions of the Estates Land Act to bring it within the definition of rent under Act IV of 1938. I.L.R. 1940 Mad. 239, followed.

K. E. Rajagopalachariar for Petitioner.

S. Ramaswami Aiyar for Respondent.

K.S.

Kuppuswami Ayyar, J.
28th November, 1941.

Venkatasubba Rao *v.* Narasappa.
S.A. No. 136 of 1940.

Civil Procedure Code (V of 1908), O. 2, r. 2—Mortgage—Principal payable only on demand—Suit for interest—If bar to later suit for principal and subsequent interest.

Where under a mortgage it is provided that the principal is to be repaid on demand and the cause of action for the same had not arisen by reason of the fact that no demand had been made for it, the claim for the principal amount would be subsisting and interest for the subsequent period could be recovered by a later even though there had been a prior suit for recovery of interest accrued due till the date of such suit.

Ch. Raghava Rao and *A. Bhujanga Rao* for Appellant.

K. Umamaheswaram for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
2nd December, 1941.

Lakshmappa *v.* Venkata Reddi.
A.A.O. Nos. 606 and 607 of 1940.

Provincial Insolvency Act (V of 1920), S. 75—"Order" holding that Court had jurisdiction to entertain applications under Madras Act IV of 1938 *and posting them for trial on merits—If appealable, "order".*

A decision upon jurisdiction has only the effect of regulating procedure and where it is not sufficient to dispose of the application hardly stands on a different footing from a ruling as to the admissibility of a document tendered or the relevancy of a question put and objected to in the course of the trial. Such decisions as to details of procedure and admissibility of evidence may, no doubt, be regarded as orders in a sense but it could not have been intended that such decisions should by themselves be open to appeal apart from the final decision disposing of the application or matter. Accordingly an order merely holding that the Court has jurisdiction to entertain applications for scaling down debts under Madras Act IV of 1938, in respect of debts due by an insolvent and posting the applications for trial on merits, is not appealable under S. 75 of the Provincial Insolvency Act.

K. Srinivasa Rao for Appellant.

V. S. Narasimhachar for Respondent.

K.S.

Burn, J.
2nd December, 1941.

Lakshmanan Chettiar *v.* Periappan.
C.R.P. No. 1884 of 1941.

Civil Procedure Code (V of 1908), S. 115 and O. 13, r. 2—Order allowing an application under O. 13, r. 2 for reception of documents after excusing delay—If open to revision as "a case which has been decided".

An order merely allowing an application under O. 13, r. 2 for reception of documents after excusing delay is not a "case decided" within the meaning of S. 115 of the Code of Civil Procedure and the order cannot be interfered with in revision.

N. G. Krishna Aiyangar for Petitioner.

B. Sitarama Rao and *T. K. Sundararaman* of Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
3rd December, 1941.

Venkataraju *v.* Ramabhaddirraju.
C.M.P. No. 7043 of 1941.

Civil Procedure Code (V of 1908), O. 41-A, r. 6—Notice of appeal—If properly served by being left with the pleader for respondent—O. 3, r. 5—If applicable.

O. 3, r. 5 of the Civil Procedure Code is a general provision and O. 41-A is a special order relating to the procedure in appeals to the High Courts from

original decrees of Subordinate Courts. It must be inferred therefore that the special provisions of O. 41-A, in so far as they are in conflict with the provisions of the other parts of the Code must prevail and must govern the procedure relating to appeals in preference to the general provisions.

In view of the fact that r. 6 of O. 41-A excludes a notice of appeal from the category of processes which can be properly served by being left at the address for service of the party to be served the inference is that such a notice must be served regularly either on the respondent or on his advocate and that service by merely leaving in the office of the advocate as provided under O. 3, r. 5 is not service on the party or his pleader, for purposes of limitation for filing memorandum of cross objections under O. 41, r. 22.

P. Satyanarayana Rao, G. Chandrasekhara Sastri and *S. Venugopala Rao* for Petitioner.

K. Venkatarama Raju for Respondents.

K.S.

Kuppuswami Ayyar, J.
5th December, 1941.

Sekharan and others *v.* The Calicut Bank, Ltd., by Liquidators.
S.A. No. 1070 of 1940.

Hindu law—Applicability—Thiyyas—Decree against father—Executability against sons and joint family property—Sons constructive parties to decree and come within purview of S. 47—Appeal and not separate suit their proper remedy.

Thiyyas are governed by the Hindu law except where they are governed by customary law contrary to the rules of Hindu law. Where there is no proof of an absence of the right of compulsory partition in the community a decree obtained by a creditor against the father is binding on his sons who cannot dispute the liability for the decree debt and the proceedings against the joint family properties. The sons being constructive parties to the proceedings in execution against their father, their objections must come within the purview of S. 47, C. P. Code and not under O. 21, r. 58 and their proper remedy to rectify an unfavourable order is by appeal and not by separate suit.

P. Govinda Menon for Appellants.

John and *Row* for Respondent.

K.S.

Burn, J.
10th December, 1941.

Suryanarayanamurti Chowdary *v.* Chandramowli.
C.R.P. No. 2605 of 1941.

Madras Local Boards Act (XIV of 1920), Ss. 56 and 57—District Judge deciding questions under S. 57, a "Court"—Jurisdiction to decide all points arising under S. 56.

A District Judge deciding questions under S. 57 of the Madras Local Boards Act is a Court. S. 57 (2) gives the District Judge complete jurisdiction to decide all points that may arise under S. 56, such as whether a notice of a meeting was due notice or not. Even if his decision is wrong it will be only a wrong decision on a point of law not affecting the jurisdiction of the Judge but affecting the disqualification or otherwise of a member. Accordingly such an order is not liable to be revised under S. 115 of the Civil Procedure Code.

V. Govindarajachari for Petitioner.

V. Subramaniam for Respondent.

K.S.

[END OF VOLUME, 1941—II.]